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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 95

RAILROAD RETIREMENT BOARD, BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES, AND GEORGE M. HARRISON, PETITIONERS

vs.

DUQUESNE WAREHOUSE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 28, 1945

CERTIORARI GRANTED JUNE 11, 1945

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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

Duquesne Warehouse Company,
Plaintiff-Appellee,

vs.

Railroad Retirement Board,
Defendant-Appellant,

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express & Station Employees, and George M. Harrison, President of said Brotherhood,
Intervening Defendants-Appellants

STATEMENT UNDER RULE 13, SUBDIVISION 4

This suit was begun in the District Court of the United States for the Southern District of New York by the filing of a complaint on May 18, 1943. The plaintiff was the Duquesne Warehouse Company, and the original defendant was the Railroad Retirement Board. On September 24, 1943, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express & Station Employees, and George M. Harrison, President of said Brotherhood, were granted leave to intervene as parties defendant.

The answer of the defendant Railroad Retirement Board was duly filed on July 21, 1943, and the answer of the intervening defendants was filed on September 24, 1943. On October 15, 1943, the plaintiff filed a notice of motion for summary judgment; on October 18, 1943, the defendant Railroad Retirement Board filed a notice of cross-motion for summary judgment; and on October 19, 1943, the intervening defendants duly served a notice of cross-motion for summary judgment, which has a filing date of July 6, 1944.

No property was attached, and there was no arrest. No trial was had, the motions of the plaintiff, the defendant Railroad Retirement Board, and the intervening defendants being heard before Honorable Henry W. Goddard, United States District Judge for the Southern District of New York, at a term of the District Court appointed for the hearing of motions, in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York, New York, on October 29, 1943. No question was referred to any commissioner, master, or referee. The decision and opinion of the Court were filed on February 29, 1944, and the final judgment was entered on March 20, 1944.

Appeal was taken by the filing of notices of appeal, by the defendant Railroad Retirement Board on June 14, 1944 and by the intervening defendants on June 20, 1944. The parties to the appeal are the Duquesne Warehouse Company, plaintiff-appellee, the Railroad Retirement Board, defendant-appellant, and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express & Station Employees, and George M. Harrison, President of said Brotherhood, intervening defendants-appellants.

IN UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

Duquesne Warehouse Company,
Plaintiff,
v.
Railroad Retirement Board,
Defendant.

SUMMONS

Issued May 18, 1943

To the above named Defendant:

You are hereby summoned and required to serve upon Burlingham, Veeder, Clark & Hupper, plaintiff's attorney, whose address 27 William St., New York, N. Y. an answer

to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

GEORGE J. H. FOLLMER
Clerk of Court.

Date: May 18th, 1943.

[Seal of Court]

IN UNITED STATES DISTRICT COURT

COMPLAINT

Filed May 18, 1943

Plaintiff complains of the defendant and alleges as follows:

First. This action arises under the Railroad Retirement Act of 1935, 49 Stat. 967, as amended by the Railroad Retirement Act of 1937, 50 Stat. 307, Part I, Section 1 thereof. It is also an action arising under a law regulating commerce, 28 U.S. Code, Section 41 (8). It is brought to compel the Railroad Retirement Board to set aside its action and decision taken and rendered on February 11, 1943, and hereinafter more particularly referred to, which action and decision plaintiff, a person aggrieved thereby, claims to be in violation of its legal rights.

Second. The plaintiff is a corporation organized under the laws of the Commonwealth of Pennsylvania and existing by virtue of the same, and since August 28, 1935 has been engaged as a public warehouseman in the business of commercial warehousing at Pittsburgh, Pa. For a limited period of time, between August 1937 and 15 May 1938, it conducted a similar busness at Erie, Pa., where it handled newsprint paper only.

Third. The defendant is an agency established by the Railroad Retirement Act of 1937 for the administration of the Railroad Retirement Acts of 1935 and 1937, and has its main office at No. 844 Rush Street, in Chicago, Illinois. The Board has established an office at No. 341 Ninth Avenue, in the Borough of Manhattan, City of New York, and within

the Southern District of New York. Under Section 9 (c) of the Railroad Retirement Act of 1935, the Board is a body corporate capable of being sued as such.

Fourth. Under date of May 23, 1939, the General Counsel of the Railroad Retirement Board in a letter to Mr. E. W. Smith, President of the plaintiff, issued an opinion that the plaintiff is an "employer" within the meaning of Section 1 (a) of the Railroad Retirement Act. A copy of that letter opinion is attached hereto and made a part hereof and marked Exhibit 1. Subsequently, and on September 15, 1939, at Washington, D. C., counsel for the plaintiff appeared before two members of the Board—the General Counsel of the Board being present also—and protested against that opinion and submitted a statement of facts and memorandum of law which the Board accepted. Copy of that statement of facts (the memorandum of law being omitted) is hereto annexed and made a part hereof and marked Exhibit 2. At the same time counsel for the plaintiff filed with the Board an executed substitute questionnaire of the Board on Form IQ-2-C, together with a letter of the same date. A copy of that questionnaire is hereto annexed and made a part hereof and marked Exhibit 3. A copy of that letter is hereto annexed and made a part hereof and marked Exhibit 4. For information purposes, copy of the executed questionnaire which was superseded by Exhibit 3 is hereto attached and marked Exhibit 5.

Fifth. On December 15, 1939, counsel for the plaintiff wrote the Chairman of the Retirement Board requesting a hearing before any finality of determination by the Board in this proceeding. Copy of that letter is attached and made a part hereof and marked Exhibit 6. Reply was made by the Chairman of the Retirement Board on January 3, 1940, a copy of which is attached hereto and made a part hereof and marked Exhibit 7. The time for submission was extended to February 15, 1940. On February 14, 1940, counsel for plaintiff submitted to the Chairman of the Retirement Board a statement of facts and memorandum of law accompanied by a letter. A copy of that statement of facts (the memorandum of law being omitted) is hereto annexed and made a part hereof and marked Exhibit 8; and a copy of that letter is also hereto annexed and made a part hereof and marked Exhibit 9. That statement of facts, Exhibit 8, was accepted under the conditions stated

in that letter, Exhibit 9. On March 12, 1942, counsel for plaintiff wrote to the Chariman of the Retirement Board his letter of March 12, 1942, copy annexed hereto and made a part hereof and marked Exhibit 10, enclosing two affidavits, one of H. A. Bietenduefel, verified March 4, 1942, the other of Wilson B. Little, verified March 2, 1942, both of which are hereto annexed and made parts hereof and marked Exhibits 11 and 12, respectively. These affidavits were accepted by the Board and made a part of the record as per letter of the Secretary of the Board of April 2, 1942, copy of which is hereto annexed and made a part hereof and marked Exhibit 13.

Sixth. On February 3, 1942, the Secretary of the Retirement Board submitted to counsel for plaintiff a proposed decision of the Board, and assigned the case for oral argument. Copy of that proposed decision is annexed hereto and made a part hereof and marked Exhibit 14. On March 27, 1942, counsel for plaintiff filed with the Board its exceptions to the proposed decision. The case was argued before the Board on May 28, 1942, all three members being present. On February 11, 1943, the Board rendered its decision, two members supporting the majority decision. One member dissented in a separate opinion. Copy of the decision and opinions are hereto annexed and made a part hereof and marked Exhibit 15.

Seventh. The exhibits which are annexed to this complaint are true and correct copies of the originals which are a part of the record in this case. From those exhibits the following facts are established and undisputed:

(1) Plaintiff is a public warehouseman chartered to conduct a storage and warehouse business; is engaged solely in the commercial warehousing business at Pittsburgh, Pa.; and was so engaged long prior to August 29, 1935, the effective date of the Railroad Retirement Act of 1935. It issues warehouse receipts pursuant to the Warehouse Receipts Act of the Commonwealth of Pennsylvania—Act of March 11, 1909, P.L. 19. The business is conducted under the direction of the Superintendent of the plaintiff who has full and unrestricted authority to conduct a commercial warehouse business in accordance with the terms of the charter of the plaintiff. On February 13, 1934, plaintiff was certificated as a member of the Code of Fair Competition for the Merchandise Warehousing Trade pursuant to

the National Recovery Act, 48 Stat. 195, and continued as such until the rendering on May 27, 1935 by the United States Supreme Court of its decision in the case of *A. L. A. Schechter Poultry Corp. et al.* v. *United States*, 295 U.S. 495.

Employees of the plaintiff are carried on its payroll, and are paid solely out of its funds. They are hired by plaintiff and discharged by it. They are under no continuing or other authority from The Pennsylvania Railroad Company to supervise and direct the manner of rendition of their services, and never have been. They are not accorded free transportation by The Pennsylvania Railroad Company; they are not entitled to become members of The Pennsylvania Railroad Voluntary Relief Department, membership in which is limited to employees and former employees of the Railroad Company, or of The Pennsylvania Railroad Employes Provident and Loan Association, membership in which is limited to employees of the Railroad Company. They have never been regarded by The Pennsylvania Railroad Company as its employees, nor by the plaintiff as other than its employees. Plaintiff has paid and is paying taxes under the Federal Social Security Act, Titles 8 and 9, and collects from the wages of its employees the tax imposed by Title 8 of the Federal Social Security Act. It also makes contributions under the State Unemployment Compensation Law, P.L. 1937, p. 2897.

(2) The operations of plaintiff are conducted at Pittsburgh, Pa., and at East Liberty, Pa., the latter being within the city limits of Pittsburgh. In each case these operations are in a warehouse building which is leased from The Pennsylvania Railroad Company. The Railroad Company retains a portion on the ground floor of each building where an officially designated freight agency of the Railroad Company is maintained with an agency employed and controlled by it. Each such station is fully equipped with tracks and other facilities for the receipt, delivery and handling of freight inbound and outbound, both carload and less. The operations of each are separate from the operations of the plaintiff. The freight which arrives at the plaintiff's warehouse at East Liberty comes in by rail and moves out in the same way. At its warehouse in Pittsburgh proper about 95% of the business of plaintiff arrives at its warehouse by rail. The balance arrives by

truck but not locally. About 60% moves outbound by rail, principally less than carload. The balance moves out by truck. Incoming freight by rail is consigned to the owner care of the plaintiff. Outbound shipments by rail are made by the plaintiff and in its name, plaintiff acting as agent for such owner.

Plaintiff has a private siding at each warehouse where carlot deliveries are made and shipments accepted by the railroad company. Delivery is made by the car being placed on the siding of the plaintiff. The railroad company has then completed its obligations. The owner unloads. Likewise, in the case of outbound carlot shipments, the railroad company places the car on the siding and the owner loads. The railroad company's obligations begin when the owner has loaded the car and the railroad company has received the property and has issued its covering bill of lading. All such freight, both inbound and outbound, in carloads by rail is carried by the railroad company at carload rates. Loading and unloading by the owner is required by Rule 27, Section 1 of the governing railroad tariff, being Consolidated Freight Classification No. 13, and reading as follows, there being no exceptions as provided in the rule:

> "Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at C. L. ratings or rates, except where the tariff of the carrier at point of origin or destination or stopover station (as the case may be) provides for the loading or unloading of C. L. freight by carrier."

All freight delivered by the railroad company to the plaintiff or received by the railroad company from the plaintiff is carried at tariff rates which are subject to the Consolidated Freight Classification. A. H. Greenly's I.C.C.—O.C. 57, Section 1 of Rule 23 of that classification is this:

> "Carriers' agents must not act as agents of shippers or consignees for the assembling or distribution of C. L. or L. C. L. freight."

Section 1 of Rule 14 of the same classification is this:

> "Carload ratings or rates apply only when a carload of freight is shipped from one station, in or on one car, except as provided in Rule 24, in one calendar

day from midnight to midnight, by one shipper for delivery to one consignee at one destination. Only one bill of lading from one loading point and one freight bill shall be issued for such C. L. shipment. The minimum C. L. weight provided is the lowest weight on which the C. L. rating or rate will apply." No exception applies to the freight under consideration here.

The plaintiff files no tariffs with the Interstate Commerce Commission or any state commission. Nor is it a party to any tariff of any railroad company or other common carrier.

(3) In the case of less than carload inbound shipments arriving by rail the freight is unloaded by the railroad company from cars to the platform of its agency, and there delivery is made to the plaintiff by the railroad company and appropriate delivery receipt taken. As to less than carload outbound shipments the plaintiff delivers the property to the agent of the railroad company at its station, and the railroad company issues its bill of lading, loads the shipment into the car and moves it out.

(4) The only commodity which is handled by the plaintiff at its East Liberty warehouse is sugar in carlots. While this freight is in the warehouse it is under the exclusive control and direction of the owner. The responsibility of the plaintiff is that of warehouseman. There is no responsibility of the railroad company. All services accorded the property, such as loading, unloading, storing, ventilating, drying, moistening, packaging and assembling are performed by the plaintiff for the owner and at the direction of the owner and charges for such services are paid to the plaintiff by the owner. While the property is in the custody of the railroad company it is subject to a tariff provision of that company (available not merely to plaintiff but to any carlot shipper of sugar at Pittsburgh and East Liberty) to the effect that if and when shipped outbound in carlots it is subject to the through railroad rate from original shipping point to ultimate railroad destination. A governing rule of the railroad tariff is this:

"While the shipments are stored in transit under these rules their custody and possession as between carrier and the consignee or owner, shall be that of the consignee or owner."

(5) The Pennsylvania Railroad Company delivers to the

plaintiff at its warehouse in Pittsburgh overfreight, damaged refused freight, and damaged unclaimed freight—all occurring while in the possession of the railroad company. In making such delivery to the plaintiff the railroad company entirely severs its connection with the transportation of the property. At the time of such delivery the plaintiff takes entire possession of the freight, reconditions it and sells it at private sale. In case the freight proves to be worthless, plaintiff disposes of it. For these services plaintiff charges the railroad company 10% of the gross proceeds of sale with deductions for any necessary expenses in reconditioning and handling, and remits the balance to the railroad company. These services take place altogether after railroad transportation has been terminated. Plaintiff has never made delivery of any of such freight to the consignee or owner for or on behalf of the railroad company. Nor has plaintiff ever disposed of, under the direction of the railroad company, any of such freight which has become so worthless as to be unsalable.

(6) During a limited period—August 1937 to 15 May 1938—plaintiff conducted a public commercial warehouse business at Erie, Pa., where it stored newsprint paper in carloads. The paper was handled in the same way as sugar is handled at East Liberty. It was consigned to the plaintiff at Erie, and delivery by the railroad company was made by placing the cars on private siding. It was shipped outbound to Pittsburgh in like way after placement of car at private siding and loading. The owner unloaded inbound and loaded outbound. The railroad company had nothing to do with the paper after delivery inbound and before receipt outbound. Plaintiff conducts no warehouse business now at Erie, Pa., and has not conducted such since the 1937-8 period. In fact the plaintiff has terminated its lease at Erie, Pa., and does not further intend to transact any warehouse business at that point.

Eighth. In the valuation of properties of The Pennsylvania Railroad Company by the Interstate Commerce Commission—22 Valuation Reports—the two warehouses heretofore referred to are not classified as carrier properties.

Ninth. (1) The finding of the majority of the Board that "Duquesne's operations are, and have been at least since August 28, 1925, directly related, functionally and

economically, to the performance of the transportation obligations which Pennsylvania has undertaken as a common carrier by railroad, and to the receipt, delivery, transfer in transit, storage, and handling of property transported by Pennsylvania by railroad" is not in accordance with the facts, is unsupported either by any substantial evidence in the record, or in fact by any evidence in the record, is contrary to the evidence in the record, and is arbitrary and contrary to law.

(2) The finding of the majority of the Board that "Duquesne is, and has been at least since August 28, 1935, engaged in the non-casual operation of equipment and facilities and the performance of non-casual service in connection with Pennsylvania's transportation of property by railroad, other than trucking service, and the receipt, delivery, transfer in transit, storage, and handling of property transported by Pennsylvania by railroad" is not in accordance with the facts, is unsupported by any substantial evidence in the record, or in fact by any evidence in the record, is contrary to the evidence in the record, and is arbitrary and contrary to law.

(3) Any other finding of the majority of the Board, either directly or indirectly, to the effect that plaintiff is controlled in its operations or managerial functions by The Pennsylvania Railroad Company; that plaintiff's operations are now and have been at least since August 28, 1935 intimately and integrally related to transportation of The Pennsylvania Railroad Company; that plaintiff is in substance an agency of The Pennsylvania Railroad Company for the purposes of storage, loading and unloading and other handling of goods transported over the lines of that railroad company; that the two warehouses operated by plaintiff, one at Pittsburgh proper and the other at East Liberty in Pittsburgh, have been valuable links in the chain of that railroad company's transportation; or that the services performed by the plaintiff are in connection with property transported by that railroad company, are not in accordance with the facts, are not supported by any substantial evidence in the record, or in fact by any evidence in the record, are contrary to the evidence in the record, and are arbitrary and contrary to law.

(4) The conclusion of the majority of the Board that

"Duquesne is now, and has been at least since August 28, 1935, an 'employer' within the meaning of Section 1 (a) of the Railroad Retirement Act" is not in accordance with the facts, is unsupported by any substantial evidence in the record, or in fact by any evidence in the record, is contrary to the evidence in the record, and is arbitrary and contrary to law.

Tenth. The undisputed facts appearing in the record require a finding that since August 28, 1935, plaintiff has not been engaged in the non-casual operation of equipment and facilities and the performance of non-casual service in connection with the transportation of property by railroad, and the receipt, delivery, transfer in transit, storage, and handling of property transported by railroad; and also require the conclusion that plaintiff is not now and has not been since August 28, 1935, an employer within the meaning of Section 1 (a) of the Railroad Retirement Acts of 1935 and 1937.

WHEREFORE, plaintiff prays (1) that the defendant be required forthwith to prepare, certify and file in the office of the Clerk of this Court a complete transcript of the entire record in this proceeding, including the originals of the exhibits which are attached to this complaint, together with the findings and opinions of both the majority and minority members of the Board; (2) that further procedure by the defendant under or pursuant to its said action or decision be stayed pending the final determination of the matters herein complained of; (3) that the said action and decision of the defendant be set aside and wholly annulled; (4) and that plaintiff have such other and further relief as to the Court may appear just and equitable in the premises.

BURLINGHAM, VEEDER, CLARK & HUPPER,
Attorneys for Plaintiff,
By RAY ROOD ALLEN,
A member of said firm.
Office and Post Office address:
27 William Street
Borough of Manhattan
City of New York, N. Y.

[Exhibits 1-15, inclusive, of the complaint have been omitted in printing pursuant to stipulation, inasmuch as they consist of copies of papers contained in the Record

before the Railroad Retirement Board in Jurisdictional Docket No. 18—In The Matter of Duquesne Warehouse Company, which Record is set forth at pages 18 through 271 of this transcript The text of the respective Exhibits of the complaint may therefore be found in this transcript, as follows:

Exhibit No.		Pages of this transcript where found
1	—	100-101
2	—	108-110, 113-114
3	—	103-107
4	—	103
5	—	58-99
6	—	125-126
7	—	126-127
8	—	133-139, 168-172
9	—	130-131
10	—	176-177
11	—	178-184
12	—	184-232
13	—	262
14	—	233-242
15	—	19-45; 45-57]

IN UNITED STATES DISTRICT COURT

ANSWER OF DEFENDANT RAILROAD RETIREMENT BOARD

Filed July 21, 1943

Comes now the defendant, the Railroad Retirement Board, and for answer to the complaint respectfully shows to the Court:

1. Defendant Board admits the allegation in paragraph "First" of the complaint that this action arises under the Railroad Retirement Act of 1935, 49 Stat. 967, as amended by the Railroad Retirement Act of 1937, 50 Stat. 307, Part I, Section 1 thereof, and avers that actions arising thereunder are required to be brought pursuant to Section 11 of the Railroad Retirement Act of 1937, which provides that a "person aggrieved may apply to the district court of any

district wherein the Board may have established an office or to the District Court of the United States for the District of Columbia to compel the Board (1) to set aside an action or decision of the Board claimed to be in violation of a legal right of the applicant or (2) to take action or to make a decision necessary for the enforcement of a legal right of the applicant. Such court shall have jurisdiction to entertain such application and to grant appropriate relief." Defendant admits the allegation in paragraph "First" of the complaint that on February 11, 1943, the defendant Board took the action or rendered the decision referred to in the said paragraph "First," but denies the allegation contained in the said paragraph "First" that such action or decision of the defendant is in violation of plaintiff's legal rights. The allegation in paragraph "First" of the complaint that this is also an action arising under a law regulating commerce, 28 U.S. Code, Section 41(8), is a conclusion of law and requires no answer, but defendant, nevertheless, denies the same, and avers that this Court possesses jurisdiction over this action solely by virtue of the provisions of Section 11 of the Railroad Retirement Act of 1937.

2. Defendant admits the first allegation in the first sentence of paragraph "Third" of the complaint, namely, that defendant is an agency established by the Railroad Retirement Act of 1937 for the administration of the Railroad Retirement Acts of 1935 and 1937, and avers that defendant is so established as an independent agency in the executive branch of the Government. Defendant also admits the second allegation of the first sentence of paragraph "Third" of the complaint and the allegation contained in the second sentence of said paragraph. The allegation in the third sentence of paragraph "Third" of the complaint is merely a conclusion of law, requiring no answer, but it is denied, nevertheless, for the reason that Section 9 of the Railroad Retirement Act of 1935 was wholly superseded by Section 11 of the 1937 Act, upon which the jurisdiction of this Court depends.

3. The allegations contained in paragraphs "Second," "Fourth," "Fifth," "Sixth," and "Eighth" of the complaint are made independently of, and without reference to, the record which was before the defendant Board when it made its decision of February 11, 1943, of which plaintiff

is here complaining, and, therefore, such allegations are irrelevant and immaterial and require no answer for the reason that this proceeding is not a *de novo* proceeding, but merely one to review, under Section 11 of the Railroad Retirement Act of 1937, the decision of the defendant Board, and in such a proceeding the Court considers only the evidence in the record before the defendant Board, a certified copy of which is filed herewith and made a part of this Answer. For the information of the Court, however, defendant denies such allegations, except insofar as they are in accord with the findings of fact made by the defendant Board in its decision (R. 1-36).

4. Defendant denies the allegations contained in paragraph "Seventh" of the complaint, except insofar as they are in accord with the findings of fact made by the defendant Board in its decision (R. 1-36).

5. The statements contained in paragraph "Ninth" of the complaint are conclusions of law and require no answer, but, nevertheless, defendant denies the same.

6. The allegations contained in paragraph "Tenth" of the complaint are conclusions of law and require no answer, but defendant, nevertheless, denies the same. Defendant avers that the defendant Board's findings that plaintiff is now, and has been at least since August 28, 1935, completely owned and controlled, through stock ownership, by the Pennsylvania Railroad Company (herein called Pennsylvania), and engaged in the non-casual operation of equipment and facilities and the performance of non-casual service, other than trucking service, in connection with Pennsylvania's transportation of property by railroad, and the receipt, delivery, transfer in transit, storage, and handling of property transported by Pennsylvania by railroad, and that, therefore, plaintiff is now, and has been at least since August 28, 1935, an "employer" within the meaning of Section 1(a) of the Railroad Retirement Act, are reasonable and are supported by substantial evidence appearing in the record before the Board, to wit:

The relevant provisions of Section 1(a) of the Railroad Retirement Act are as follows: "The term 'employer' means any carrier [express company, sleeping-car company, or carrier by railroad subject to Part I of the Interstate Commerce Act] * * * and any company which is directly or indirectly owned or controlled by one or more

such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad * * *." All of plaintiff's stock has always been owned and controlled by Pennsylvania, a carrier by railroad subject to Part I of the Interstate Commerce Act, and plaintiff's principal officers have been officers of Pennsylvania (R. 57, 58, 105, 130); and at least since August 28, 1935, plaintiff has been primarily, principally, and predominantly engaged in the receipt, delivery, transfer in transit, storage, and other handling of goods transported over the railroad lines of Pennsylvania (R. 58-60, 105-106, 131-135).

Plaintiff operates two warehouses, one in Pittsburgh proper and the other at East Liberty, within the city limits of Pittsburgh. Both warehouses are owned by Pennsylvania and operated by plaintiff under lease from Pennsylvania. A portion of the ground floor of each warehouse is retained by Pennsylvania and used and officially designated by it as its "freight agency." Plaintiff's warehouses and Pennsylvania's "freight agencies" are both served by the same railroad tracks of Pennsylvania and are equipped with platforms or sidings and other facilities for the receipt, delivery, and handling of inbound and outbound freight of Pennsylvania (R. 105, 130-131).

At the East Liberty warehouse, plaintiff handles and stores only one commodity, carload sugar, all of which comes in and goes out over Pennsylvania's rails (R. 58, 105, 131). The sugar is handled by plaintiff under storage-in-transit privileges covered by railroad tariffs filed by Pennsylvania with the Interstate Commerce Commission (R. 58, 132). Incoming shipments are consigned to the owner care of Duquesne, the route being designated as "Penn RR—For Stge in Transit"; and outgoing shipments are consigned to the owner, the bill of lading having a transit record number and being marked "accorded transit privileges at East Liberty, Pa." (R. 131, 165, 166). Plaintiff unloads the sugar from the Pennsylvania's railroad cars upon their arrival and reloads the sugar into

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Pennsylvania's railroad cars upon their departure (R. 58, 106, 131, 132). In the case of incoming sugar, delivery is made by Pennsylvania and receipt is taken by plaintiff when Pennsylvania places the railroad cars on plaintiff's siding and plaintiff then unloads. In the case of outgoing shipments, the empty railroad cars are placed by Pennsylvania on plaintiff's siding and loaded by plaintiff, which then receives Pennsylvania's bill of lading (R. 59, 131).

At its Pittsburgh warehouse, plaintiff handles freight which has come in, or is destined for movement, over Pennsylvania's rails, or which has both come in and is going out over Pennsylvania's rails. Approximately 95 per cent of the commodities handled at that place, which commodities are diverse in character and are hauled in both carload and less-than-carload form, come in by rail, and approximately 60 per cent leave by rail (R. 105, 133). The services performed by plaintiff at the Pittsburgh warehouse are similar to those at East Liberty insofar as carload freight is concerned. Plaintiff loads and unloads the railroad cars as they come onto and depart from its platform, stores the railroad-transported goods, and performs other handling services in connection with the receipt and delivery of the railroad-transported goods (R. 59, 106, 131, 133). As to the less-than-carload freight, plaintiff, in addition to storing it, performs the handling involved in delivering it to and receiving it from Pennsylvania's platform. In the case of incoming less-than-carload shipments, the freight is unloaded by Pennsylvania from the cars to its platform and is delivered to and received by plaintiff on such platforms. In the case of outgoing less-than-carload shipments, plaintiff delivers the freight onto Pennsylvania's platform; Pennsylvania then issues its bill of lading, loads the freight into the cars, and moves them out (R. 59, 106, 133).

Plaintiff also performed, during the period between August 1937 and May 1938 unloading, storing, and reloading services and other transit details at Erie, Pennsylvania, in connection with carload shipments of newspaper print entitled to storage-in-transit privileges under Pennsylvania's tariffs. These services were similar to those performed by plaintiff at East Liberty (R. 58, 135).

Plaintiff, in addition, performs services "in connection with" the transportation of property by railroad in

handling, reconditioning, and selling for Pennsylvania over freight, damaged refused freight, and damaged unclaimed freight. Out of the gross proceeds realized by plaintiff from each sale of freight delivered to it for disposal by Pennsylvania, plaintiff deducts a commission of 10 per cent and any amounts paid by it for reconditioning, drayage, freight, and other charges, and turns the balance over to Pennsylvania. When any freight is returned by plaintiff to Pennsylvania upon the latter's order, Duquesne is reimbursed only for the actual expenses incurred by it plus storage charges (R. 59, 83-86, 105, 133-134, 175-178). Under the original contract between plaintiff and Pennsylvania, entered into on February 1, 1922, if any lot of freight became so worthless as to be unsalable, plaintiff was required to dispose of it as directed by Pennsylvania (R. 85). Under the new contract of January 2, 1941, plaintiff is given authority to dispose of such goods as it sees fit (R. 176). The original contract also provided that if the owner of any unclaimed freight is ascertained prior to the sale of such freight, plaintiff was to deliver such freight, upon instructions from Pennsylvania, to the owner, and was to receive from the owner such charges as plaintiff has paid to Pennsylvania (R. 84). The new contract provides that under such circumstances plaintiff shall, upon Pennsylvania's request, return such freight to Pennsylvania upon repayment of all charges thereon which plaintiff shall have paid to Pennsylvania (R. 176).

WHEREFORE, the defendant Board prays that the complaint be dismissed and the said decision of the defendant Board be sustained.

(Signed) JOSEPH H. FREEHILL
Joseph H. Freehill
Attorney for Defendant
Railroad Retirement Board
844 Rush Street
Chicago, Illinois

July 19, 1943

CERTIFIED COPY OF RECORD BEFORE RAILROAD RETIREMENT BOARD IN JURISDICTIONAL DOCKET NO. 18 IN THE MATTER OF DUQUESNE WAREHOUSE COMPANY

UNITED STATES OF AMERICA
RAILROAD RETIREMENT BOARD
844 Rush Street
Chicago, Illinois

Murray W. Latimer
Chairman
L. M. Eddy
F. C. Squire

July 16, 1943

I, Mary B. Linkins, Secretary of the Railroad Retirement Board, hereby certify that the attached two hundred and seventy-seven pages, numbered for the purpose of this certification, 1 through 277, constitute a true copy of the record before the Board in Jurisdictional Docket No. 18, In the Matter of Duquesne Warehouse Company.

(Signed) MARY B. LINKINS
Secretary of the
Railroad Retirement Board

[Seal of Railroad
Retirement Board]

RAILROAD RETIREMENT BOARD

In the Matter of Duquesne Warehouse Company } Jurisdictional Docket No. 18

DECISION OF THE BOARD

Statement of the Case

In order to enable determination of claims for annuities under the Railroad Retirement Act based in part upon service rendered to the Duquesne Warehouse Company, herein called Duquesne, the General Counsel, under duly delegated authority, ruled on May 23, 1939, that Duquesne is an "employer" under the Railroad Retirement Act, and that, consequently, service rendered to it from August 1, 1906, the date of its incorporation, to date, is creditable toward annuities under that Act. Duquesne Warehouse Company, Railroad Retirement Board Law Bulletin No. 2, page 530. The ruling of the General Counsel was based on Duquesne's response to the Board's Questionnaire Form LQ-2 (revised) which is contained in the record herein.

On September 15, 1939, counsel for Duquesne appeared before Board Members Eddy and Reed to protest the ruling of the General Counsel and submitted a memorandum in support of Duquesne's position and a completed Board Questionnaire Form LQ-2-c. Upon requests of counsel, Duquesne was allowed until February 15, 1940, to file further evidence and argument in support of its position that it is not an "employer" within the meaning of the Railroad Retirement Act. Duquesne filed, on February 14, 1940, a memorandum of law and a statement of facts which was made part of the record herein.

On January 29, 1942, the Board issued a proposed decision that Duquesne is an "employer" under the Act as a company directly owned and controlled by a "carrier employer" under the Act and engaged in the non-casual operation of equipment and facilities and the performance of non-casual services in connection with the transportation of property by railroad, other than trucking service, and the receipt, delivery, transfer in transit, storage, and handling of property transported by railroad. On March

28, 1942, Duquesne filed exceptions to the Board's proposed decision and a brief in support of such exceptions. At about the same time, Duquesne requested that the Board include in the record affidavits from H. B. Bietenduefel, Duquesne's Superintendent, and Wilson V. Little, Executive Secretary of the American Warehousemen's Association, containing facts which had been developed since February 14, 1940. The request was granted. Pursuant to Duquesne's further request, a hearing was held before the Board on May 27, 1942, for the purpose of oral argument upon the issues raised in the proceeding. In addition to Duquesne, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, herein called the Brotherhood of Railway Clerks, was represented and participated at such hearing. The position of the Brotherhood of Railway Clerks, representing Duquesne's employees, is that Duquesne is an "employer" under the Railroad Retirement Act.

3 Findings of Fact and Conclusions

After careful consideration of the record herein, the exceptions and brief filed by Duquesne, and the arguments of Duquesne and the Brotherhood of Railway Clerks, the Board makes the following findings of fact and conclusions:

Findings of Fact

1. Duquesne was incorporated on August 1, 1906, under the laws of the State of Pennsylvania. Since Duquesne's incorporation, it has been directly and completely owned and controlled, through stock ownership, by the Pennsylvania Railroad Company, herein called Pennsylvania, a carrier by railroad subject to Part I of the Interstate Commerce Act.

2. Duquesne's principal officers are also officers of Pennsylvania. As of February 17, 1939, such common officers were as follows:

Duquesne Office	Pennsylvania Office
E. W. Smith, President and Director	Vice President
W. S. Franklin, Director	Vice President
J. Taney Willcox, Secretary	Secretary
J. Gordon Watson, Assistant Secretary	Assistant Secretary
Geo. H. Papst, Jr., Treasurer	Assistant Vice President and Treasurer
H. W. Schotter, Assistant Treasurer	Assistant Treasurer
John Pemberton, Jr., Assistant Treasurer	Assistant Treasurer
F. J. Fell, Jr., Comptroller	Vice President and Comptroller
Elmer Hart, Assistant Comptroller	Deputy Comptroller
A. R. Meredith, Real Estate Agent	Real Estate Agent

4 3. Duquesne's operations are now and have been at least since August 28, 1935, intimately and integrally related to Pensylvania's railroad transportation. Duquesne has been primarily, principally and predominantly engaged in the storage, loading and unloading, and other handling of goods transported over the lines of Pennsylvania, being in substance an agency of Pennsylvania for such purposes.

4. The two warehouses operated by Duquesne—one in Pittsburgh proper and the other at East Liberty in Pittsburgh—have been valuable links in the chain of Pennsylvania's railroad transportation. They are owned by Pennsylvania and are operated by Duquesne under lease from Pennsylvania. A portion of the ground floor of each warehouse is retained by Pennsylvania and used and officially designated by it as its "freight agency." Duquesne's warehouses, as well as Pennsylvania's "freight agencies", are served by Pennsylvania's railroad tracks and are equipped with platforms or sidings and other facilities for the receipt, delivery, and other handling of inbound and outbound freight.

5. At the East Liberty warehouse, Duquesne handles and stores only one commodity, carload sugar, which comes in and goes out over Pennsylvania's rails. The sugar is handled by Duquesne under storage-in-transit privileges permitted and covered by railroad tariffs filed by Pennsylvania with the Interstate Commerce Commission. Part of the sugar which passes through Duquesne's warehouse is refined in California and part in New York. That refined in California is moved by ship to one of the eastern ports, such as Philadelphia or Baltimore, and thence by

rail to Pittsburgh; and that refined in New York is
5 shipped by rail directly form New York to Pittsburgh.
At Duquesne's warehouse, which is used as a distribution center, the packages of sugar are assembled in the proper number and sizes and then shipped out over Pennsylvania's lines for distribution. Incoming shipments are consigned to the owner care of Duquesne, the route being designated as "Penn R R—For Stge in Transit"; and outgoing shipments are consigned to the owner, the bill of lading having a transit record number and being marked "accorded transit privileges at East Liberty, Pa." Both the unloading of the sugar from, and its reloading into, Pennsylvania cars are performed by Duquesne at the latter's siding for the account of the shipper in accordance with the governing rail tariff (Consolidated Freight Classification No. 13) requiring owners to load and unload freight carried at carload rates. In the case of incoming sugar, delivery is made by Pennsylvania and receipt is taken by Duquesne when Pennsylvania places the cars on Duquesne's siding, and Duquesne then unloads. In the case of outgoing shipments, the empty cars are placed by Pennsylvania on Duquesne's siding and loaded by Duquesne, which then receives Pennsylvania's bill of lading. The handling and storage charges are billed by Duquesne directly against the owners of the property and are paid by such owners.

6. At its Pittsburgh warehouse, Duquesne is principally engaged in the handling of freight which has come in, or is destined for movement, over Pennsylvania's rails, or which has both come in and is going out over Pennsylvania's rails. Approximately 95 per cent of the commodities handled at that place, which commodities are diverse in character and are hauled in both carload and less-
6 than-carload form, come in by rail, the remainder coming in by truck. The respective rail and truck percentages of the outgoing commodities are 60 and 40. The services performed by Duquesne at the Pittsburgh warehouse are similar to those at East Liberty insofar as carload freight is concerned, except that no sugar is handled. As to the less-than-carload freight, Duquesne, in addition to storing it, performs the handling involved in delivering it to and receiving it from Pennsylvania's platform. The loading and unloading of less-than-carload freight is per-

formed by Pennsylvania at its platform. In the case of incoming less-than-carload shipments, the freight is unloaded by Pennsylvania from the cars to its platform and is delivered to and received by Duquesne on such platform. In the case of outgoing less-than-carload shipments, Duquesne delivers the freight onto Pennsylvania's platform; Pennsylvania then issues its bill of lading, loads the freight into the cars, and moves them out.

7. Duquesne also performed, during the period between August 1937 and May 1938 unloading, storing, and reloading services and other transit details at Erie, Pennsylvania, in connection with carload shipments of newspaper print entitled to storage-in-transit privileges under Pennsylvania's tariffs. These services were similar to those performed by Duquesne at East Liberty.

8. Duquesne's position as an agency of Pennsylvania, available to provide such facilities and services as the latter requires, appears further from Duquesne's handling, reconditioning, and selling for Pennsylvania, over freight, damaged refused freight, and damaged unclaimed freight under a contract originally entered into between the two companies on February 1, 1922, and superseded by a contract dated January 2, 1941. Pennsylvania transports to Pittsburgh any freight it desires to be disposed of by Duquesne and Duquesne removes such freight to its warehouse after the payment to Pennsylvania of all freight and other charges that may have accrued thereon. Out of the gross proceeds realized by it from each sale, Duquesne deducts a commission of 10 per cent and any amounts paid by it for reconditioning, drayage, freight, and other charges, and turns the balance over to Pennsylvania. In the event that the gross proceeds of the sale of freight do not equal the expenses incurred by Duquesne, plus the 10 per cent commission, Duquesne is credited with the difference. When any freight is returned by Duquesne to Pennsylvania upon the latter's order, Duquesne is reimbursed only for the actual expenses incurred by it plus storage charges. Under the original contract, if any lot of freight became so worthless as to be unsalable, Duquesne was required to dispose of it as directed by Pennsylvania. Under the new contract, Duquesne is given authority to dispose of such goods as it sees fit. The original contract also provided that if the owner of any unclaimed freight

is ascertained prior to the sale of such freight, Duquesne was to deliver such freight, upon instructions from Pennsylvania, to the owner, and was to receive from the owner such charges as Duquesne has paid to Pennsylvania. The new contract provides that under such circumstances Duquesne shall, upon Pennsylvania's request, return such freight to Pennsylvania upon repayment of all charges thereon which Duquesne shall have paid to Pennsylvania.

8 9. Duquesne's revenues for the years 1936 through 1938 show the substantial extent to which it has been engaged in functions and activities connected with Pennsylvania's railroad transportation:

	Storage and handling of freight under storage-in-transit privileges	Storage and handling of other freight (including freight coming in or going out, or both, over Pennsylvania's rails)	Sale of damaged merchandise	Subleasing of space to manufacturing concerns
1936	$ 59,570.40	$ 63,011.60	$ 8,599.00	$32,732.00
1937	30,239.93	91,545.99	11,409.00	24,967.00
1938	29,836.01	73,702.99	8,881.86	16,035.17
	$119,646.34	$228,260.58	$28,889.86	$73,734.17

10. In addition to the above revenue figures, the substantial extent to which Duquesne has been engaged in the handling of freight accorded storage-in-transit privileges may be stated in terms of space used. Of the total space used by Duquesne at its warehouses at East Liberty and Pittsburgh, approximately 30 per cent was devoted to the handling of freight accorded storage-in-transit privileges in 1936; approximately 12.5 per cent in 1937, and approximately 12.5 per cent in 1938. During the period of operation at Erie, all the space at that point was used for such freight.

11. All of Duquesne's operations are intermingled. Duquesne's employees are not assigned exclusively to any one operation but are frequently shifted from one class of work to another. The extent to which personnel was required, however, for the various operations for the years 1936 through 1938, estimated on the basis of the approxi-

mate number of men required on a full-time basis to perform the work in such operations, is as follows:

	Storage and handling of freight under storage-in-transit privileges	Storage and handling of other freight (including freight coming in or going out, or both, over Pennsylvania's rails)	Sale of damaged merchandise	Subleasing of space to tenants
1936	28	30	3	4
1937	14	42	3	4
1938	14	42	3	4

12. Duquesne's employees are affiliated with one of the railway labor organizations, the Brotherhood of Railway Clerks, and their working conditions are governed by a contract between the Brotherhood and Duquesne.

13. Duquesne's operations are, and have been at least since August 28, 1935, directly related, functionally and economically, to the performance of the transportation obligations which Pennsylvania has undertaken as a common carrier by railroad, and to the receipt, delivery, transfer in transit, storage, and handling of property transported by Pennsylvania by railroad.

14. Duquesne is, and has been at least since August 28, 1935, engaged in the non-casual operation of equipment and facilities and the performance of non-casual service in connection with Pennsylvania's transportation of property by railroad, other than trucking service, and the receipt, delivery, transfer in transit, storage, and handling of property transported by Pennsylvania by railroad.

10 CONCLUSIONS

Applying the established principles of law to the facts in this case, it is concluded that Duquesne is now, and has been at least since August 28, 1935, an "employer" within the meaning of Section 1(a) of the Railroad Retirement Act, and that compensated service rendered to Duquesne from August 1, 1906, the date of its incorporation, to date, is creditable for purposes of that Act.

OPINION

Duquesne concedes that it is directly owned by Pennsylvania within the meaning of Section 1(a) of the Railroad Retirement Act. And, in fact, it is clear upon the record that Duquesne has been both directly owned and controlled by Pennsylvania from the very beginning of Duquesne's corporate existence. All of Duquesne's stock has always been owned and controlled by Pennsylvania and Duquesne's officers have been officers of Pennsylvania.

The only issue here is whether Duquesne is engaged in the non-casual operation of equipment or facilities or the performance of non-casual service in connection with the transportation of property by railroad, or the receipt, delivery, transfer in transit, storage, or handling of property transported by raiload, within the meaning of Section 1(a) of the Railroad Retirement Act.[1]

11 That Duquesne is so engaged follows from our ruling of February 21, 1939, B.O. No. 39-84, R.R.B. Law Bull. No. 2, p. 532, that the Baltimore Fidelity Warehouse Company, a company operating a terminal warehouse business at points adjacent to freight terminals of the Baltimore and Ohio Railroad Company and storing goods which have been transported or are awaiting transportation by railroad, is an "employer" under the Railroad Retirement Act;[2] and from a number of decisions follow-

[1] The relevant provisions of Section 1(a) are as follows:
"The term 'employer' means any carrier [express company, sleeping-car company, or carrier by railroad subject to part I of the Interstate Commerce Act] . . . , and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad. . ."

[2] Duquesne does not apparently question the validity of the Board's ruling in the *Baltimore Fidelity* case, but seeks rather to distingish that case from the present one on the ground that Baltimore Fidelity, in addition to its warehousing activities, solicited freight as agent for its controlling carrier. Although its minor activity of freight solicitation served to emphasize the intimate relationship between Baltimore Fidelity and its controlling carrier, the determinative factor in that case was that Baltimore Fidelity, under conditions of a close operating relationship with its parent carrier, has been engaged in the storage of goods which, for the most part, have been transported or are awaiting transportation over the lines of its parent carrier.

ing that ruling. *B. R. & P. Warehouse, Inc.*, R.R.B. Law Bull. No. 2, p. 527; *Terminal Storage Company of Washington, id.*, p. 524; *Lackawanna Terminal Warehouses, Inc., id.*, p. 537; *North Western Warehouse Company*, L-41-315; *Oklahoma Bonded Warehouse Company*, L-41-259; *Overland Terminal Warehouse Company*, L-42-288.

As appears in our findings, Duquesne is principally engaged in the following activities: (1) loading and unloading of carload freight transported over Pennsylvania's lines, (2) receipt and delivery of carload freight and less-than-carload freight transported over Pennsylvania's rails, (3) storage of goods under Pennsylvania's storage-in-transit privileges, (4) storage of goods coming in or going out, or both, over Pennsylvania's rails, and (5) handling Pennsylvania's damaged and over freight. In our opinion,
12 all these activities are clearly included within the language of Section 1(a) of the Act enumerating the activities which will qualify a carrier affiliated company as an "employer."

It is evident that the first three activities are performed in connection with "the receipt," "delivery," "transfer in transit," "storage," and "handling" of property transported by railroad. In fact, when Duquesne loads and unloads, receives and delivers, stores, and otherwise handles goods under Pensnylvania's storage-in-transit privileges, it not merely performs services "in connection with" transfer in transit, but it *transfers in transit*. See *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U.S. 498, 526-527; *Storage of Cocoa Beans in New York District*, 231 I.C.C. 575, 577. It may be noted that in reply to question 6(a) of Board Questionnaire Form LQ-2 (revised), calling for a description of "the operation of any equipment or facilities, or the performance of any services by respondent in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad," Mr. E. W. Smith, Duquesne's president, set forth the arrangements whereby Duquesne "unloads, stores, reloads, and handles other transit details" at East Liberty and Pittsburgh.

It is also clear, in our opinion, that under the circumstances of this case the functions and activities of Duquesne

as to the storage of goods which are not in transit but which have been transported or are awaiting transportation over Pennsylvania's lines constitute services "in connection with the transportation of * * * property by railroad." When it is considered that Duquesne's warehouses are located next to Pennsylvania's freight agencies
13 and are highly convenient for use by shippers and consignees of goods transported by Pennsylvania, and that the availability of such storage facilities largely determines the rail route over which property will be shipped, it becomes clear that such storage functions and activities are closely related, functionally and economically, to Pennsylvania's railroad transportation and therefore constitute services "in connection with the transportation of * * * property by railroad." Section 202.07 of the Regulations, 20 Code Fed. Reg. 856; *Baltimore Fidelity Warehouse Company, B. R. & P. Warehouse, Inc., Terminal Storage Company of Washington, Lackawanna Terminal Warehouses, Inc., North Western Warehouse Company, Oklahoma Bonded Warehouse Company, Overland Terminal Warehouse Company*, all *supra*. It may be noted that warehousing activities like those of Duquesne are conducted by numerous railroads throughout the
14 United States, either directly or through subsidiaries, as an incident to their rail transportation service, because by providing such services, railroads are able to induce shippers to use their rail facilities and thereby in-

[a] See, e.g., *Baltimore & Ohio R. R. Co. v. United States*, 305 U. S. 507, where the Supreme Court stated as follows (at pp. 516-517):

"All of the carriers 'now generally store freight on piers owned or leased by them in warehouses operated by affiliated or subsidiary companies.' This business is carried on in various ways. Some carriers lease space to shippers for warehousing; others have aided in financing structures on their property in which they lease space from their own subsidiaries; and still others own directly the buildings and lease them to subsidiaries for warehouse operations. In all cases the carriers exercise sufficient control over the warehouse facilities to make them subservient to the competitive needs of the carriers. Their entrance into warehousing was brought about by a desire to induce shippers to use particular rail facilities and as first one and then the other of the carriers gained traffic by their warehouse conveniences, it seemed necessary for their competitors to equip themselves with similar advantages. Obviously a shipper, who can secure transportation, storage, handling and insurance together from a carrier and its affiliates for an aggregate cost which is less than the sum for which he can secure the various services when purchased separately from carriers and non-affiliated enterprises, will deal with those offering the best terms. The storage largely determines the transportation route."

crease the volume of traffic over their respective lines. See, e. g., *Baltimore and Ohio Railroad Co.* v. *United States*, 305 U.S. 507; *Propriety of Operating Practices—New York Warehousing*, 198 I.C.C. 134, 216 I.C.C. 291; *McCormick Warehouse Co.* v. *P. R.R. Co.*, 95 I.C.C. 301; *New York Storage*, 40 I.C.C. 265. And it has been recognized that such warehousing activities are conducted for the same purposes and achieve the same results, whether they are conducted directly by the railroads or by subsidiaries of the railroads. See *Baltimore and Ohio Railroad Co.* v. *United States*, 305 U. S. 507, 516-517; *Propriety of Operating Practices—New York Warehousing*, 198 I.C.C. 134, 138-139; 216 I.C.C. 291, 293-294.[*]

15 Duquesne is also engaged in the performance of services "in connection with" railroad transportation in handling, reconditioning, and selling for Pennsylvania over freight, damaged refused freight, and damaged unclaimed freight. These services are directly related to Pennsylvania's railroad transportation since the need therefor arises directly out of Pennsylvania's transportation activities and they are, in substance, performed simply on behalf of Pennsylvania and constitute a means whereby Pennsylvania is enabled to collect freight and other charges on unclaimed goods and to recoup losses on goods damaged in transit. Section 202.07 of the Regulations, *Supra*.

Counsel for Duquesne contends that Section 1(a) of the Railroad Retirement Act is limited in scope to those services which constitute "transportation" as defined in Section 1(3) of the Interstate Commerce Act. The invalidity of this contention is shown hereafter. But even assuming that such a contention could be sustained, we believe that Duquesne would nevertheless be an "employer" because

[*] In the reports on *Propriety of Operating Practices—New York Warehousing*, the Interstate Commerce Commission stated that, although in some cases the warehousing facilities are owned and operated directly by the carrier, and in others, by affiliated or subsidiary companies, "the result is always the same, namely, possession and control of warehouse facilities available to serve whatever competitive purposes railroad management may have in mind." The Commission held (198 I.C.C. 134, at p. 197):

"We cannot sustain the view that freight rates and storage or warehousing charges are not to be considered together because the warehousing services are in some instances conducted by separate corporations or companies. The record clearly shows that the interests of the carriers in those corporations or companies extend to complete and active domination and control. The substance and not mere form of the relations should govern."

it is engaged in many services which clearly fall within the term "transportation" as defined in Section 1(3) of the Interstate Commerce Act. Duquesne loads and unloads railroad cars. Such loading and unloading have repeatedly been recognized as direct and important elements of railroad transportation, *Baltimore and Ohio Southwestern Railroad Co.* v. *Burtch*, 263 U.S. 540, 544; *Atchison, Topeka & Santa Fe Railway Co.* v. *United States*, 295 U.S. 193, 198; *Loading and Unloading Carload Freight*, 101 I.C.C. 394; and have been held to constitute "transportation" as 16 defined in Section 1(3) of the Interstate Commerce Act. *Adams* v. *Mills*, 286 U.S. 397; *Merchants Warehouse Co.* v. *United States*, 283 U.S. 501; *Haberman* v. *Pennsylvania R. Co.*, 234 I.C.C. 167, 173; *Loading and Unloading Carload Freight*, 101 I.C.C. 394; *McCormick Warehouse Co.* v. *P. R.R. Co.*, 95 I.C.C. 301. As stated in our findings, Duquesne receives, delivers, and handles property transported by railroad and performs services in connection therewith. The language as to "receipt," "delivery," and "handling" in the Railroad Retirement Act and the Interstate Commerce Act is identical. Duquesne's activities in receipt, delivery, and handling of property transported by railroad are plainly within the definitions of both Acts. Finally, Duquesne is also extensively engaged in performing transfer-in-transit and storage-in-transit of goods transported by Pennsylvania and allowed that transit privilege under Pennsylvania's tariffs, *Storage of Cocoa Beans in New York District*, 231 I.C.C. 575. Such storage and transfer services are within the definition of "transportation" in Section 1(3) of the Interstate Commerce Act. *American Warehousemen's Association* v. *Inland Waterways Corporation*, 188 I.C.C. 13; *Storage in Transit at New Haven, Conn.*, 190 I.C.C. 209; *Storage at New London and Thamesville, Conn.*, 190 I.C.C. 213; *Propriety of Operating Practices—New York Warehousing*, 220 I.C.C. 102, 103, aff'd *Baltimore & Ohio R.R. Co.* v. *United States*, 305 U.S. 507.

Counsel for Duquesne earnestly urges that the services performed by Duquesne are not within the definition of "transportation" in Section 1(3) of the Interstate Commerce Act because Pennsylvania is not under a duty to shippers or consignees to perform such services. However

it may be as to Pennsylvania's being under legal obli-
17 gation to perform such services, we are unable to find,
and Duquesne presents no plausible warrant for the assertion, implicit in its contention, that the coverage of services under Section 1(a) of the Railroad Retirement Act should have read into it a requirement that the particular activities of the subsidiary must be part of the carrier's legal obligations to the public. Even if Section 1(a) is coextensive with Section 1(3) of the Interstate Commerce Act—that is, with the definition of "transportation" contained in that section—it by no means follows that it should further be limited by the extraneous and variable factors which would determine whether the services were by statute or undertaking a part of the parent carrier's obligations to the public. Section 1(a) applies to a kind of operation, and is concerned with the type of work the subsidiary is doing. It is not cast in terms of legal duty or responsibility, and there is no warrant for construing it as if it did. Section 1(3) itself, to which Section 1(a) is likened, speaks solely as a definition. It is settled that the definition of "transportation" in Section 1(3) includes services which a carrier may choose to, but need not, perform. *American Warehousemen's Association* v. *Inland Waterways Corporation*, 188 I.C.C. 13, 15; *Berg Industrial Alcohol Co.* v. *Reading Co.*, 142 I.C.C. 161. It is by virtue of other provisions of the Interstate Commerce Act that under varying circumstances varying legal consequences attach to activities embraced by the definition.

The contention of Duquesne's counsel that the coverage of Section 1(a) of the Railroad Retirement Act should be restricted to services which constitute transportation as defined in Section 1(3) of the Interstate Commerce Act has long since been rejected in many precedents settled in
Board administration of the Railroad Retirement and
18 Railroad Unemployment Insurance Acts. The fallacies which underlie this contention are thoroughly discussed in our decisions in *Lenoir Car Works*, May 6, 1939, B.O. 39-291, R.R.B. Law. Bull. No. 2, p. 323, and *Union Pacific Coal Company*, May 31, 1940, B.O. 40-299. However, in view of the emphasis given to this point by Duquesne, a recapitulation of the Board's position with respect thereto may be helpful.

In light of the general purpose of the Railroad Retire-

ment Act and accepted doctrines of statutory construction, the Board has construed the carrier affiliate coverage provision as denoting services which are an integral part of, or are closely related to, the rail transportation system of a carrier and as including within its coverage (1) carrier affiliates engaged in activities which are themselves railroad transportation or which are rendered in connection with goods in the process of transportation, such as loading and unloading railroad cars, receipt, delivery, transfer in transit, and other handling of property transported by railroads; and also (2) carrier affiliates engaged in activities which enable a railroad to perform its rail transportation, such as maintenance and repair of way and equipment, and activities which enable a railroad to operate its rail system more successfully and to improve its services to the public, such as auxiliary bus transportation, dining facilities, and incidental warehousing services.

19 In the Board's opinion, the intent to include the second category of services is expressed in the Act by the language "any service • • • in connection with the transportation of passengers or property by railroad." The phrase "service *in connection with* transportation • • • by railroad," according to the ordinary usage of language, is not restricted to services which are themselves "transportation" by railroad or which are performed on goods in the course of transportation by railroad, but necessarily includes services which are connected with and relate to railroad transportation. This is confirmed by judicial definition. *Danciger* v. *Cooley*, 248 U.S. 319, 327; *Kokusai Kisen Kabushiki Kaisha* v. *Columbia S. Co.*, 23 Supp. 403, 405-406 (S.D. N.Y.), aff'd without opinion, 100 F. (2d) 1016 (C.C.A. 2d); *J. Ray Arnold Lbr. Corp.* v. *Richardson*, 105 Fla. 204, 141 So. 133, 135; *Guxney* v. *Atlan. & G. W. Ry. Co.*, 58 N. Y. 358, 366, 371-372; *Wallrabenstein* v. *Industrial Comm.*, 195 Wis. 15, 216 N.W. 495, 496.[5] In the

[5] In *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 444, the court expressly recognized that services rendered by a forwarder to a railroad in maintaining offices, advertising the railroad, and soliciting traffic over it were "in a practical sense connected with such transportation." (pp. 446-447). The case, however, arose under Section 15(13) of the Interstate Commerce Act, which provides that "if the owner of property transported . . . directly or indirectly renders any service connected with such transportation . . . the charge and allowances therefor shall be no more than is just and reasonable . . ." This Section was designed simply to permit a shipper to receive an allowance from a carrier for the perfor-

20 *Danciger* case, the Supreme Court stated (p. 327):

"To be within the statute it is essential that the act of collecting the purchase price be done 'in connection with the transportation of' the liquor. *The statute does not say 'in the transportation', but 'in connection with' it.* * * * What Cooley did, while not part of the transportation, was closely connected with it." (Underscoring supplied.)

If there were any doubt as to the correctness of the Board's interpretation of the carrier affiliate coverage provision, no doubt could persist in the face of express statements in confirmation by the Congressional committee reports on the Railroad Retirement Act and also on the Carriers Taxing Act, the "employer" definition of which is the same as that of the Railroad Retirement Act. The Senate Committee on Interstate Commerce, in reporting on the Railroad Retirement Act of 1937, stated that "there are brought within the scope of the Act substantially all those organizations which are intimately related to the transportation of passengers or property by railroad in the United States." S. Rep. No. 697, 75th Cong., 1st Sess., p. 7. Substantially the same statements were made in the Reports, both of the Senate Committee on Finance and the House Committee on Ways and Means, accompanying the
21 Carriers Taxing Act of 1937. S. Rep. No. 818, 75th Cong., 1st Sess., p. 4; H. Rep. No. 1071, 75th Cong., 1st Sess., p. 5. In the latter reports (S. Rep. p. 2; H. Rep. p. 3), it is also stated that "the scope of the existing tax legislation has been changed in such way as to bring into the coverage substantially all those who are intimately associated with the operation of United States railroads." It may further be noted that Senator Wagner, who was in

mance of part of a carrier's transportation service. From its context, therefore, it obviously can relate only to services which are a part of the actual transportation that a carrier is obligated to furnish and are susceptible of a charge or allowance. Accordingly, despite its recognition given to the ordinary meaning of the term "connected," the court was constrained to hold that the services are not covered by the statute. Certain other provisions of the Interstate Commerce Act which contain a similar phrase are, from their context, applicable only to services which the railroad is obligated under its tariffs to furnish and for which a shipper may be charged. See, for example, Section 1(5) which requires that charges for services "in the transportation of passengers or property . . . or in connection therewith" be just and reasonable; and Section 6(7) which forbids departures from the published tariff rates "for such transportation of passengers or property, or for any services in connection therewith."

charge of the Railroad Retirement Act of 1937 on the floor of the Senate, stated that the Act "covers a great number of employees, not only those directly in the railroad business but those associated with it." Cong. Rec., vol. 81, part 6, p. 6223.

The construction that the carrier affiliate coverage provision denotes services which are an integral part of, or are related to, the rail transportation system of a carrier, or, as stated in the committee reports on the legislation, services "which are intimately related to the transportation of passengers or property by railroad," and those "intimately associated with the operation of United States railroads," has been applied consistently in the relevant administrative determinations by both the Railroad Retirement Board, in its administration of the Railroad Retirement and Railroad Unemployment Insurance Acts, and by the Bureau of Internal Revenue, in its administration of the Carriers Taxing Act, and, with isolated exceptions, has been accepted by the parties and acted upon accordingly. The Board has embodied this construction in a formal regulation adopted June 1, 1938 (Section 202.07 22 of the Regulations, 20 Code Fed. Regs. 856),[6] and has applied it consistently in numerous determinations respecting individual companies which, in their relations and operations, are entirely similar to Duquesne.

Thus, the Board, in a number of cases, has established the rule that warehouse services performed under conditions substantially the same as those presented here constitute services in connection with railroad transportation. *Baltimore Fidelity Warehouse Company, B. R. and P. Warehouse, Inc., Terminal Storage Company of Washington, Lackawanna Terminal Warehouses, Inc., North Western Warehouse Company, Overland Terminal Warehouse*

[6] The provision reads as follows:

"*Service or operation in connection with railroad transportation.* The service rendered or the operation of equipment or facilities by persons or companies owned or controlled by or under common control with a carrier is in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage or handling of property transported by railroad, if such service or operation is reasonably directly related, functionally or economically, to the performance of obligations which a company or person or companies or persons have undertaken as a common carrier by railroad, or to the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad."

Company, Oklahoma Bonded Warehouse Company, all *supra.*[7] Likewise, in a long line of unanimous Board decisions and General Counsel's opinions, this interpretation has been applied by the Board in determining that many other controlled companies, which are engaged in activities that are not railroad transportation but are an integral part of, or closely related to, a railroad transportation system, are "employers" within the scope of the Act. The decisions cover passenger bus companies (*Monon Transportation Co.*, R.R.B. Law Bull. No. 1, p. 5; *Boston & Maine Transportation Co., id.*, p. 24; *Reading Transportation Co., id.*, p. 29; *Frisco Transportation Company,* L-42-654; *Rio Grande Motor Way, Inc.,* L-42-690); steamship companies (*New England S.S. Co.*, R.R.B. Law Bull. No. 2, p. 23. 476; *Central Vermont Transportation Co.*, B.O. 41-10; *Schuylkill Navigation Co.*, L-42-664); telegraph companies (*Great Northwestern Telegraph Company of Canada,* R.R.B. Law Bull. No. 2, p. 385); tie preserving companies (*Santa Fe Tie & Lumber Co., id.*, p. 276; *Somers Lumber Co.*, L-42-201); hospital associations (*Chesapeake & Ohio Ry. Employees' Hospital Ass'n.*, R.R.B. Law Bull. No. 2, p. 211); railroad office building companies (*Southern Pacific Bldg. Co., id.*, p. 371); railroad equipment manufacturing, repair, and maintenance companies (*Lenoir Car Works, id.*, p. 323; *Oneida Machinery Co., id.*, p. 322; *Hatfield-Campbell Creek Coal Co.*, L-42-186; *St. Andrews Bay Lumber Co., Locomotive & Car Repair Shops,* L-42-125); water supply companies (*Beaver Creek Water Co.*, R.R.B. Law Bull. No. 2, p. 550; *Union Pacific Water Co., id.*, p. 546); railroad dining car companies and eating houses (*Fred Harvey Dining Car Operations, Fred Harvey,* and *Fred Harvey Service, Inc., id.*, pp. 135, 138, 140); barge companies (*Kelley's Creek Barge Line, Inc., id.*, p. 13); railroad land companies (*Rock Island Improvement Co., id.*, p. 266); dock and terminal companies (*Allouez Bay Dock Co., id.*, p. 168; *Long Dock Co., id.*, p. 169; *Boca Grande Terminal Co.*, L-41-654); electric power supply companies (*Erwin Electric Light & Power Co.*, L-41-620); railroad construction companies (*Illinois Dredging & Construction Co.*, L-42-523); ticket agen-

[7] It may be noted that all these warehouse companies have accepted the ruling made as to their status. In fact, the Baltimore Fidelity Warehouse Company, the Lackawanna Terminal Warehouses, Inc., and the B. R. and P. Warehouse, Inc., strongly urged before the Board that they were covered by the Railroad Retirement Act.

cies (*Indianapolis Interurban Joint Ticket Agency*, L-42-373); and mutual benefit associations (*Mutual Beneficial Ass'n of Penn. R.R. Employees, Inc.*, L-40-209;[8] *Chicago, North Shore & Milwaukee R.R. Employees' Mutual Benefit Ass'n.*, L-42-313). It may be noted that in the one instance in which a determination of the Railroad Retirement Board involving this issue has been litigated, the action of the Board has been sustained. *Utah Copper Company* v. 24 *Railroad Retirement Board*, 129 F. (2d) 358. In that case, which was decided on August 11, 1942, the Circuit Court of Appeals for the Tenth Circuit upheld the determination of the Railroad Retirement Board, in its Jurisdictional Docket No. 5, that a carrier affiliated copper company was an "employer," *pro tanto*, by virtue of its operation of shops for repair of the railroad's equipment. The court held that the work done by the individuals in the operation of such shops was "connected with transportation" of passengers and property by railroad, although such work did not constitute railroad transportation or transportation as defined in Section 1(3) of the Interstate Commerce Act. The Supreme Court denied a writ of certiorari in this case on December 7, 1942. *Utah Copper Company* v. *Railroad Retirement Board*, 87 Law. Ed. 172.[9]

[8] This company, like Duquesne, is a Pennsylvania subsidiary and no question has ever been raised as to its coverage even though it does not perform any service constituting "transportation" as defined in Section 1(3) of the Interstate Commerce Act.

[9] In the case of *Marion H. Allen* v. *Ocean Steamship Company of Savannah*, 123 F. (2d) 469 (C.C.A. 5th), a proceeding under the Carriers Taxing Act, it was held that the Ocean Steamship Company is not an "employer" within the meaning of that Act on the ground that it is a carrier by water and not by rail and that it is a part not of the railroad but of the maritime industry. As the Board was informed by the Solicitor General of the United States, the Government has failed to seek certiorari in this case not because of any concurrence on its part in the decision of the case but because the peculiar facts in the record before the Circuit Court made it doubtful that a decision by the Supreme Court would materially affect the coverage situation and, therefore, in the Solicitor's opinion, the case was not of sufficient importance to justify a petition for writ of certiorari. To the extent that the opinion in the *Ocean Steamship Company* case may be considered to conflict with the established interpretation of the carrier affiliate coverage provision as that interpretation is applied to other carrier affiliates, the Board has been constrained not to consider the opinion as a controlling precedent but rather has continued to apply such interpretation as affirmed in the subsequent judicial pronouncement in the *Utah Copper Company* case, in which case certiorari has been denied by the Supreme Court. See, e. g., the Board's unanimous decision in *Somers Lumber Company* and General Counsel's Opinions on *Overland Terminal Warehouse Co.*, *Frisco Transportation Co.*, *Rio Grande Motor Way, Inc.*, *Schuylkill Navigation Co.*, *Hatfield*

25 Conversely, the application of this interpretation has resulted in determinations that many railroad owned or controlled companies are not "employers" because their activities do not constitute an integral part of a railroad transportation system. The decisions cover bridge companies (*Bridge Company*, R.R.B. Law Bull. No. 2, p. 41); independently operated passenger motor bus companies (*Soundview Transportation Company, id.*, p. 111; *Jamieson Stages, Incorporated, id.*, p. 112); cement companies (*Arkansas Portland Cement Company, id.*, p. 120); lumber companies (*Frost Lumber Industries, Incorporated, of Texas, id.*, p. 120; *Puget Sound Pulp and Timber Company, id.*, p. 303; *Southwest Lumber Mills, Incorporated* and *Cady Lumber Corporation, id.*, p. 306); investment companies (*American Contract and Trust Company, id.*, p. 201); real estate companies (*New York State Realty and Terminal Company, id.*, p. 270; *Penn-Haven Realty Company, id.*, p. 376); leather companies (*Union Tanning Company, id.*, p. 272); railroad car manufacturing and vending companies (*Pullman Standard Car Manufacturing Company, id.*, p. 344); chemical companies (*Pennsylvania Salt Manufacturing Company, id.*, p. 363; *Michigan Alkali Company, id.*, p. 364); toll road companies (*Harbor Island Causeway Company, id.*, p. 523); public water supply companies (*Lykens Water Company, id.*, p. 553); hotel companies (*Maple Shade Inn, Pulaski, Virginia, id.*, p. 260); and public electric power supply companies (*Toledo Edison Company*, L-42-187).

On the basis of this interpretation, therefore, the Board, in the determination of the many cases that have come before it, has delimited the scope of carrier subsidiary 26 coverage and has established a workable pattern of inclusion and exclusion for determining whether or not such companies are within the coverage of the Act.

The application of this construction by the Bureau of Internal Revenue in its administration of the Carriers Taxing Act is shown in two published rulings, involving the operation of coordinated motor bus service and the opera-

Campbell Creek Coal Co., St. Andrews Bay Lumber Co., Locomotive & Car Repair Shops, Boco Grande Terminal Co., Illinois Dredging & Construction Co., Erwin Electric Light & Power Co., Indianapolis Interurban Joint Ticket Agency, Chicago, North Shore & Milwaukee R. R. Employees' Mutual Benefit Ass'n., supra, all decided after the Circuit Court's decision in the *Ocean Steamship Company* case.

tion of hospital and related services (*O. Transportion Co.*, C.T. 12, Cum. Bull. 1938-2, p. 345; *M. Hospital Association*, C.T. 16, Cum. Bull. 1939-1, p. 317), and in a number of unpublished rulings. Many of the cases decided by the Railroad Retirement Board have not also called for determinations by the Commissioner of Internal Revenue since the companies, following the Board's determinations, have regularly paid the self-assessing taxes required by the Taxing Act.

This contemporaneous and continued construction of the carrier affiliate coverage provisions by the Railroad Retirement Board and the Bureau of Internal Revenue has received legislative sanction. Following a determination by the Railroad Retirement Board in *Union Pacific Coal Company*, May 31, 1940, B.O. 40-299, that the activities of carrier subsidiaries engaged in mining coal for the purpose of servicing railroad operations through supplying locomotive fuel for the railroad system of the parent carrier constituted the performance of a service in connection with railroad transportation, legislation was adopted to exclude specifically from the coverage of the statutes carrier subsidiaries engaged in mining and supplying coal to railroads. Act of August 13, 1940, C. 664, 54 Stat. 785.

27 It may be properly inferred that if the consistent rulings of the Board concerning the various companies whose activities related to railroad transportation but were not a part of such transportation, or "transportation" as defined in Section 1(3) of the Interstate Commerce Act, were not deemed by Congress to be correct, the Acts would have been amended to overturn them. *Massachusetts Mutual Life Ins. Co.* v. *United States*, 288 U.S. 269, 273. Congress, however, has never excluded any other types of carrier affiliates, although the various rulings of the Board construing the carrier affiliate coverage provisions were brought to the attention of Congress in the course of the passage of the coal mining amendment.[10]

[10] The report of the Senate Committee on Interstate Commerce accompanying the amendment stated (Report of the Senate Committee on Interstate Commerce on S. 4070, S. Rep. 1744, 76th Cong., 3rd Sess., p. 2):

"Certain carriers by railroad own and operate coal mines directly with their own employees. In addition, another and larger group of carriers have wholly owned subsidiaries engaged in mining coal for the purpose of servicing railroad operations through supplying locomotive fuel for the railroad system of the parent carrier. After investigation of these activities the general counsel of the Railroad

28 The weight to be attached to a contemporaneous and continued administrative construction in the interpretation of a statute, particularly where there is the implication of legislative sanction, is of course well settled. E. g., *Koshland* v. *Helvering*, 298 U.S. 441, 445; *United States* v. *Madigan*, 300 U.S. 500, 505; *Massachusetts Mutual Life Ins. Co.* v. *United States*, 288 U.S. 269, 273. Here there
29 is double importance to be attached to the consideration that the interpretation should not be disturbed unless clearly wrong, for the problem is concerned with the administration of a social insurance system for a whole nationwide industry. It must be recognized that the administrative process, lending itself to the continuous specialized consideration of all types of individual cases, is particularly fitted to mark out the boundaries of that sys-

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Retirement Board advised that in his opinion these activities constituted the performance of a service in connection with the transportation of persons and property by railroad and that, consequently, these companies were employers, as the term "employer" is defined in the Railroad Retirement Acts and the Railroad Unemployment Insurance Act, . . .

"The companies affected disagreed and requested a hearing before the Board. This request was granted, elaborate evidence was presented before an examiner, and arguments were made before the Board. Upon the consideration of the evidence and argument, the Board found itself compelled by the statutory language to conclude that these companies are legally subject to the Railroad Retirement Acts and the Railroad Unemployment Insurance Act. The opinion of the Board with respect to the status of Union Pacific Coal Co., copy of which has been forwarded to the committee, shows that the conclusion was dictated not by any feeling of the Board that such coal mining operations ought, as a matter of policy, to be covered by the acts administered by the Board, but rather by consistent application of the interpretation of the acts promulgated in rulings that other carrier affiliates engaged in such activities as manufacturing and supplying equipment parts, furnishing water for locomotives, furnishing auxiliary or substitute bus or water transportation, furnishing dining facilities, treating ties, transmitting telegraphic communications, providing hospital and medical facilities, and providing maintenance of buildings, are employers subject to the act. The Board, as well as railroad employers, railroad employees, the mine workers, the Federal Security Administrator and State unemployment compensation administrations, believes that as a matter of policy such coal-mining activities, whether conducted directly by carriers or by subsidiaries of carriers, should for purposes of a social-insurance program and for purposes of labor relations be covered by the system of laws applicable to coal mining generally rather than the system of laws applicable to the railroad industry. The committee believes such a policy to be sound and, accordingly, recommends the enactment of S. 4070 so as to exclude coal-mining operations from the acts covering the railroad industry without disturbing or prejudicing the application of those acts to other railroad affiliates. Section 6 of the bill makes this purpose clear."

tem with the ultimate precision and certainty that the term "insurance" implies.

This result has now been substantially achieved in the light of six years' experience with the subject by the Railroad Retirement Board and, in the light of the numerous precedents which it has established over that period of time. On the basis of its rulings, and the rulings of the Bureau of Internal Revenue, large sums of taxes have regularly been paid by many taxpayers under the Carriers Taxing Act, and hundreds of participants are receiving, and are entitled for life to continue to receive, thousands of dollars each month, under annuity obligations now in force.

The gravamen of the argument for restricting the scope of the carrier affiliate coverage provision of the Railroad Retirement Act to services which constitute "transportation" as defined in Section 1(3) of the Interstate Commerce Act is the fact that in the course of the legislative hearings on the bills which became the Railway Labor Act of 1934, references were made in the committee hearings to the definition of "transportation" in Section 1(3) of the Interstate Commerce Act, and that, in connection with the enactment of the Railroad Retirement Act of 1937, witnesses at the committee hearings referred to the coverage in terms of "railroad transportation." We believe it sufficient to state, *first*, that none of these statements can definitely be said to have been directed specifically to the proposition that the scope of Section 1(a) is *restricted* in the manner suggested, but that, in terms of the particular issue here before us, they are equivocal in character, constituting at best rough, rule-of-thumb, generalizations as to the coverage of these acts, and *secondly*, that they represent no more than the hypothetical opinions of committee witnesses, derived by inference from testimony susceptible of conflicting inferences. There is ample authority that material of this character may not properly be used as an aid to construction. *Commission* v. *Broadcasting System*, 311 U.S. 132, 136, 137; *McCaughn* v. *Hershey Chocolate Co.*, 283 U.S. 488, 493-494.[11]

[11] It should be noted that the question of the weight to be attached to this material was considered in detail by the Railroad Retirement Board in its opinions dealing with this question in *Lenoir Car Works* (R. R. B. Law Bull. No. 2, p. 323), and *Union Pacific Coal Company*, *supra*. These

Moreover, whatever significance might otherwise be attached to this material, is dissipated by the evidence which directly and affirmatively indicates that, in fact, Section 1(a) was not intended to be restricted to companies
31 engaged in "transportation" within the definition of Section 1(3) of the Interstate Commerce Act. This is shown by the very testimony at the Congressional hearings, upon which the contention is based, by the committee reports, by a comparison and analysis of the language of the sections themselves, and by a comparison of the purposes of the Interstate Commerce Act on the one hand and the Railroad Retirement Act on the other.

The testimony in question is principally that of Mr. Eastman, Coordinator of Transportation, who was draftsman of the Railway Labor Act of 1934, and Mr. Harrison, who appeared at Congressional committee hearings on the Railroad Retirement Act as Chairman of the Railway Labor Executives Association. The significant part of Mr. Eastman's testimony is the clear expression of his intention that the maintenance and repair of way and equipment were covered.[12] But such activity is not within the definition of Section 1(3) of the Interstate Commerce Act. It is evident that such services could not be included under Section 1(a), if at the same time it was intended to
32 limit Section 1(a) to services covered by Section 1(3).

Similarly, the effect of any reference to coverage made by Mr. Harrison in terms of "railroad transportation" is removed by his express reference to railroad subsidiaries handling "mechanical work" and "accounting and collecting" for railroads as covered by the Act. These activities,

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determinations in which the arguments based on this material were rejected, were made prior to Congress' adoption of the coal mine exception to Section 1(a) of the Act, and, as noted above, the *Union Pacific Coal Company* opinion was forwarded to the Senate Interstate Commerce Committee in connection with their consideration of the amendment (*supra*, p. 17).

[12] Mr. Eastman, in explaining the definition as initially drafted, which made reference to the Interstate Commerce Act, indicated unequivocally an intention that maintenance of equipment, way, and structures, even though not performed by the carrier, should be covered. See Hearings before the Senate Committee on Interstate Commerce on S. 3266, 73d. Cong., 2d Sess. (1934), pp. 10-11. He then commented:

"I may say that in reading that over last night I am not sure the language does cover all companies to which railroads on occasion have contracted out their maintenance work, and it perhaps should be examined rather carefully from that point of view."

Subsequently he presented the amendment which was incorporated into the bill as enacted.

of course, are not services which are performed upon goods in the course of their transportation by railroad, nor do they constitute transportation as defined in Section 1(3) of the Interstate Commerce Act. Clear implication of the intention not to restrict the carrier affiliate coverage provision to railroad transportation in the ordinary sense or as defined in Section 1(3) of the Interstate Commerce Act is also found in the committee reports on the Railroad Retirement and Carriers Taxing Acts which specifically include in the coverage non-casual railroad construction and repair operations. S. Rep. No. 697, 75th Cong., 1st Sess., p. 7; S. Rep. No. 818, 75th Cong., 1st Sess., p. 4; H. Rep. No. 1071, 75th Cong., 1st Sess., p. 5.

Moreover, it appears on the face of the statute itself that the carrier affiliate provisions of Section 1(a) cover activities beyond those defined as "transportation" within the definition of Section 1(3) of the Interstate Commerce Act. Section 1(3) provides as follows:

> "* * * The term 'transportation' as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and *all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigerator icing, storage, and handling of property transported.*" (Italics supplied.)

33 This is to be contrasted with the definition of Section 1(a) which includes within the term "employer" not only any carrier affiliate which performs "any service * * * in connection with * * * the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad" (the services which are enumerated in Section 1(3) of the Interstate Commerce Act) *but also* any carrier affiliate which performs "any service * * * in connection with the transportation of passengers or property by railroad." And in accordance with well-established rules of statutory construction some meaning must be given to this additional clause. *Ex parte Public Bank*, 278 U.S. 101, 104; *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208; *McDonald* v. *Thompson*, 305 U.S. 263, 266. No effective meaning is attributed to the clause if it is regarded merely as a general state-

ment explained by the specific enumeration of services which follow, for the clause specifically embraces services in connection with the transportation of both *passengers* and property whereas the specifically enumerated services of receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling relate solely to *property*.

Apart from that fact, however, the disjunctive "or" between the general provision referring to the operation of "any equipment or facility" or the performance of "any service * * * in connection with * * * transportation * * *," on the one hand, and the enumeration of activities, "receipt, delivery, etc.," on the other, makes it clear that the latter enumeration is not merely explanatory of, or in apposition to, the preceding general provision, but is intended to specify certain additional services intended
34 to be covered. As ordinarily used, the word "or" must be construed as a disjunctive expressing an alternative or giving a choice of one among two or more things. *Danciger* v. *Cooley*, 248 U.S. 319, 326-327; *N. Y. Central Securities Co.* v. *United States*, 287 U.S. 12, 23; *Ohio Fuel Supply Co.* v. *Paxton*, 11 F. (2d) 740 (C.C.A. 6th); *Smith* v. *Farley*, 155 App. Div. 813, 140 N. Y. Supp. 990.

The conclusion that the carrier affiliate coverage of Section 1(a) is not restricted to affiliates engaged in "transportation" as that term is defined in Section 1(3) of the Interstate Commerce Act is confirmed by comparison of the purposes of the Railroad Retirement Act with the purposes of Part I of the Interstate Commerce Act. See *South Chicago Company* v. *Bassett*, 309 U.S. 251, 259-260; *Ozawa* v. *United States*, 260 U.S. 178, 194; *Detroit Trust Company* v. *The Barlum*, 393 U.S. 21, 38. Section 1(3) is concerned with those activities in which shippers are directly interested. Consequently, certain activities which are intimately related to or connected with railroad transportation, such as railroad maintenance of way, structures, and equipment, are not brought under the Interstate Commerce Commission's jurisdiction by the provisions of Section 1(3) of the Interstate Commerce Act, since they are services performed in connection with the carrier's own operations and are, of course, neither offered to the public nor required to be offered.

The Railroad Retirement Act, however, was intended to

establish a retirement system for employees in all phases of railroad operations. Section 1(a) includes within the
35 term "employer" not only carriers by railroad, express companies, and sleeping-car companies subject to Part I of the Interstate Commerce Act (which constitute the primary coverage of the Act) and the carrier affiliates (which we are here discussing), but also railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies, and other associations controlled and maintained by two or more "employers" as aforesaid and performing services in connection with or incidental to railroad transportation; national railway labor associations and certain of their committees, and their insurance departments, local lodges, and divisions. It is therefore evident that the Congressional purpose was to extend the coverage of the Act well beyond the scope of the provisions of the Interstate Commerce Act. The inclusion of the type of coverage contemplated by the carrier affiliate coverage provision was manifestly prompted by the consideration that certain operations and services intimately and integrally related to railroad transportation and whose performance is effectively controlled by carriers are engaged in by companies other than railroads, and it was designed to bring such operations and services within the coverage of the Act despite the existence of arrangements, contractual or otherwise, whereby entities separate from any carrier conduct those operations. These operations and services may not only be rendered in connection with goods in process of transportation, such as receipt, delivery, transfer in
36 transit, etc., which services are within the provisions of Section 1(3) of the Interstate Commerce Act, but may also consist of such other services as maintenance of way structures, and equipment, which make possible or facilitate such transportation.

Upon consideration of all cases and arguments submitted by counsel for Duquesne and the Brotherhood of Railway Clerks, it is found on the facts of this case that services performed by Duquesne are performed in connection with the transportation of property by railroad and the receipt, delivery, transfer in transit, storage, and handling of property transported by railroad within the meaning of those terms as they are defined in Section 1(a) of the

Railroad Retirement Act. It is held, therefore, there being no question that Pennsylvania owns Duquesne, that Duquesne is and has been an "employer" within the meaning of the Railroad Retirement Act.

Decided February 11, 1943.

MURRAY W. LATIMER
Murray W. Latimer, Chairman

L. M. EDDY
L. M. Eddy, Member

37 MEMORANDUM

Chicago, Illinois
February 19, 1943

To The Board
Mary B. Linkins, Secretary
From M. R. Reed
Subject Duquesne Warehouse Company
Jurisdictional Docket No. 18

For the record and in support of my vote against and dissent from the majority findings in the matter of Duquesne Warehouse Company, Jurisdictional Docket No. 18, expressed in Board Order 43-93, February 11, 1943, I am filing herewith in writing my dissenting opinion.

M R REED

Enclosure

38 RAILROAD RETIREMENT BOARD

In the Matter of Duquesne Warehouse Company } Jurisdictional Docket No. 18

MR. REED, BOARD MEMBER, DISSENTING

A careful review and study of the record established in this case including all submissions, briefs, arguments and hearings, together with an intimate personal knowledge of the activities, operations and physical layout of Duquesne, compels me to disagree with and dissent from the majority findings, conclusions and Order of the Board in this matter. To assist in a better understanding of the basis of this disagreement, I recount here a finding of facts.

The Warehouse Company will be referred to as Duquesne, and The Pennsylvania Railroad Company as the Railroad.

39 FINDINGS OF FACT

1. Duquesne is a corporation of the Commonwealth of Pennsylvania. Its business as stated in its charter is "for the purpose of conducting a storage and warehouse business." It does a commercial warehouse business in Pittsburgh, Pa. at two locations—one in Pittsburgh proper and the other at East Liberty in Pittsburgh. It conducts no services in any way relating to passengers. It issues warehouse receipts pursuant to the Warehouse Receipts Act of Pennsylvania—Act of 11 March 1909, P.L. 19. Its stock is owned by the Railroad.

2. Duquesne's operations are confined to two commercial warehouses—one in Pittsburgh proper and the other at East Liberty in Pittsburgh. The two warehouses are owned by the Railroad and leased by it to Duquesne, except that a portion of the space on the ground floor of each warehouse is retained by the Railroad and used by it and officially designated in its tariffs as its freight stations for the general receipt and delivery of freight. The Railroad maintains an agency force at each station. These stations are fully equipped with tracks and other facilities for the receipt, delivery and handling of inbound and outbound freight, both carlot and less; and such service is rendered to the public generally. The operations of each are altogether separate from the operations of Duquesne.

3. Each warehouse has a railroad private siding where delivery is made by the Railroad in carlots to Duquesne. Placement on the siding by the Railroad is complete
40 delivery to Duquesne. Transportation by railroad has then been completed. The owner unloads the cars. On outbound carlot shipments the Railroad places the empty cars on the siding and the owner loads. The Railroad does not come into possession of the property until loading has been completed, shipping instructions have been furnished to the Railroad, and the Railroad has issued its bill of lading in acceptance of the freight. On inbound delivery and outbound shipment of less than carload freight such delivery and acceptance are made and given by the

agency of the Railroad at the warehouses. Inbound the owner takes the freight from the Railroad station platform and receipts to the Railroad accordingly. Outbound the owner delivers the freight to the Railroad at the railroad station platform, and the Railroad accepts and issues its bill of lading covering. Transportation by railroad inbound in carlots ends on siding delivery; and on outbound begins upon completion of loading by shipper, furnishing to the Railroad of shipping instructions, and the issuance by the Railroad of its bill of lading. On less than carlot shipments transportation by railroad ends on delivery to the owner at the platform of the station agency, and begins on receipt from the owner at the same point.

4. All carlot shipments delivered to Duquesne by the Railroad and shipped out from Duquesne's warehouses over the railroad are carried by the Railroad at carload rates. As is customary generally with carload freight, and as required by the governing tariff of the Railroad, the owner unloads on inbound and loads on outbound. The requiring rule is No. 27, Section 1, of the governing tariff, which is Consolidated Freight Classification presently numbered 13, and reading as follows, (there being no exceptions as covered in the rule);

41 "LOADING OR UNLOADING.

"Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at CL ratings or rates, except where tariff of carrier at point of origin or destination or stopover station (as the case may be) provides for loading or unloading of CL freight by carrier."

5. After delivery of the freight by the Railroad to Duquesne, both carlot and less, the possession is that of Duquesne and the property is under the exclusive control and direction of Duquesne. A like situation prevails on outbound goods until delivery by Duquesne to the Railroad. During the control and possession by Duquesne, liability, if any, for loss, damage or injury to the property is that of Duquesne. Responsibility of the Railroad as to carlot freight inbound ceases upon delivery on the siding to Duquesne, and on outbound does not arise until receipt from Duquesne of the property loaded into the car and the issu-

ance of the bill of lading. The same applies on less than carload freight at the time of delivery by the Railroad to Duquesne on inbound shipments, and upon receipt from Duquesne of outbound shipments. All services accorded the property by Duquesne, such as loading, unloading, storing, ventilating, drying, moistening, packaging, assembling and distributing, are performed by Duquesne at the direction of the owner; under arrangements made direct by the owner with Duquesne; and charges for such services are made by Duquesne to the owner direct and paid by the owner direct to Duquesne.

6. At its warehouse in Pittsburgh proper, Duquesne conducts a general commercial warehousing business. That business comes to it both by rail and truck, and goes out likewise. About 40% moves out by truck. Carlot shipments by rail inbound are consigned to the owners care of Duquesne. Unloading is performed by Duquesne for the owners. Outbound, carlot loading is performed by Duquesne for the owners. The owners are the shippers and so appear on the bills of lading. In the case of less than carlot shipments, Duquesne takes delivery for the owners at the platform of the railroad station agency, and on outbound shipments delivers for the owners to the Railroad at the same point.

7. At its East Liberty warehouse the only commodity handled by Duquesne is sugar in carlots. The sugar is packaged freight, originates at the eastern seaboard, and reaches Pittsburgh by rail transportation. It is consigned to the shipping sugar company care of Duquesne. Duquesne is used by the owner for storage, warehouse handling and subsequent distribution. Delivery inbound is made by the Railroad, and shipment outbound made by the owner as described in previous findings.

8. The tariff of the Railroad under which sugar and other carlot shipments of the commodities named in the tariff are transported by the Railroad carries a transit provision. That is, sugar and the commodities named in the tariff are transported by the Railroad to Pittsburgh and there delivered to the consignees at the carload rates local to Pittsburgh. If and when subsequently shipped out over the same railroad, the sugar is entitled to the through rate from the initial point of shipment to ultimate destina-

tion. The governing tariff on the Railroad, however, contains this express provision:

43 "While the shipments are stored in transit under these rules their custody and possession as between carrier and the consignee or owner, shall be that of the consignee or owner."

9. The transit provision in the tariff of the Railroad is not particular to any one consignee. It is restricted to commodities and locations, but is open to all receivers and shippers of named commodities at the named points. For instance, transit on sugar is accorded by the Railroad also at Chicago, Detroit, Fort Wayne and Indianapolis; on lumber at Cincinnati, Fort Wayne and Toledo; on dairy products at Cincinnati, Cleveland, Detroit and Indianapolis; on grain at Chicago, Cincinnati, Pittsburgh and St. Louis; on iron and steel at Ambridge, Pa., Chicago and Logansport, Indiana. In addition, at East Liberty the transit provision is applicable also on canned food stuffs.

10. This same sugar arrangement at Pittsburgh has long been availed of by another large sugar refining company located on the eastern seaboard. It makes carlot shipments of sugar to Pittsburgh, consigning the same to another warehouse company. That company has a warehouse located on the line of the Railroad at Pittsburgh, connected with which is a private siding. The sugar of that refinery is shipped from the eastern seaboard to the warehouse company over the line of the Railroad, delivered by the Railroad to the warehouse company on its private siding, handled by the warehouse company while in its possession, and later distributed by the warehouse for the owner at Pittsburgh and throughout surrounding territory. Previous to 1942 much of this sugar was received by that warehouse company from the Railroad, handled by the warehouse

44 company and then shipped out by the warehouse company over the railroad under the transit arrangement in precisely the same way as the sugar of another refinery is handled by Duquesne at its East Liberty warehouse. This arrangement terminated with the year 1941 because of contractual arrangements between the warehouse company and the refining company.

11. During a limited period, Duquesne operated a warehouse at Erie, Pa., where newsprint paper in carlots was stored for the Pittsburgh Press. The facilities were in

use August 1937 to 15 May 1938. That was occasioned by an emergency with respect to price conditions on newsprint paper. The paper was delivered inbound by the Railroad to Duquesne on private siding of Duquesne, and on outbound movement was received by the Railroad from Duquesne and transported to Pittsburgh where delivery was made by the railroad to the newspaper. The services of loading, unloading and handling by Duquesne were similar to those with respect to sugar at East Liberty. As of May 1, 1941, the lease of those facilities was terminated and Duquesne now performs no service whatever at Erie, Pa., and is not in a position to do so.

12. Duquesne files no tariffs with the Interstate Commerce Commission or with any public utility commission of any state. Nor is it a party to any tariff, either state or federal, of any common carrier subject to the provisions of Part I of the Interstate Commerce Act.

13. Duquesne sublets parts of its warehouse building at Pittsburgh proper to tenants who conduct their business there. They are chiefly manufacturing concerns or representatives of manufacturers. Duquesne has nothing to do with any shipments delivered to them by the railroad or made by them over the railroad. The Railroad delivers freight to them and receives freight from them in the same manner as freight is delivered to Duquesne by the Railroad and received by the Railroad from Duquesne.

14. Gross revenues of Duquesne for the years 1936-1938 were as follows:

Year	Storage and handling of freight under transit provision	Storage and handling of other freight	Sale of Salvaged freight	Subleasing of space to tenants
1936	$59,570.40	$63,011.60	$ 8,599.00	$32,732.00
1937	30,239.93	91,545.99	11,409.00	24,967.00
1938	29,836.01	73,702.99	8,881.86	16,035.17

Of the space in the two warehouses at East Liberty and Pittsburgh proper, the approximate percentage of space devoted to operations with respect to freight coming under the transit arrangement was 30% in 1936, 12.5% in 1937, 12.5% in 1938. Total space was used at Erie for the limited period during which that warehouse was in operation. Of the employees of Duquesne engaged in the services

with respect to freight coming under the transit provision, the approximate number of employees was 28 in 1936, 14 in 1937, and 14 in 1938. The approximate number of other employees of Duquesne engaged in general commercial storage in 1936 were 30, in 1937—42, in 1938—42; engaged in the handling of damaged and refused merchandise, 3 in 1936, 1937 and 1938; engaged in the subleasing of space to tenants, 4 in the year 1936, 1937 and 1938.

15. At its warehouse in Pittsburgh proper, Duquesne receives from the Railroad over freight and damaged freight which is unclaimed or refused. Upon delivery by the Railroad, Duquesne takes entire possession of the freight, reconditions it where necessary and possible, and sells it at private sale. In case the property proves to be worthless, Duquesne disposes of it as determined by its judgment. Duquesne has never made delivery of any freight for the Railroad. The present contract, effective 2, January 1941, contains no provision for such delivery, nor has Duquesne at the direction of the Railroad ever disposed of any freight which has become worthless. For its services Duquesne charges the Railroad 10% of the gross proceeds of sale, with deduction for any necessary expense in reconditioning and handling, and remits the balance to the Railroad. Should the gross proceeds realized at any sale not equal the expenses of Duquesne in handling the freight, plus the 10% commission, Duquesne is credited with the difference. All of the services of Duquesne with respect to this property are altogether after the freight has finished transportation in railroad service, and are separate and independent transactions.

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16. Employees of Duquesne are on the pay roll of that company only, and are paid solely out of its funds. They are hired by Duquesne and may be discharged by it only. They come only under the supervision, direction and authority of a Superintendent, who has full and unrestricted authority to conduct a commercial warehouse business in accordance with the charter of the company. These employees are not accorded free transportation by the Railroad and never have been. They are not entitled to become members of The Pennsylvania Railroad Voluntary Relief Department or The Pennsylvania Railroad Employes Provident and Loan Association, organizations in which membership is restricted as to the Relief Department

to employees and former employees of the Railroad, and as to the Provident and Loan Association to employees
47 of the Railroad. They have never been regarded by the Railroad as its employees or by Duquesne as other than its employees.

17. Duquesne pays taxes under the Federal Security Act, Titles VIII and IX, now numbered Sections 1410 and 1600 of the Internal Revenue Code, respectively. It collects from its employees 1% of their wages under Section 1400 of the Internal Revenue Code. It meets the requirements of the Fair Labor Standards Act of 1938. The hours of labor of its employees are regulated accordingly. It is subject to the Pennsylvania Workmen's Compensation Act of 1915, P.L. of 1915, 736, as amended, and pursuant to the terms of that Act provides the required insurance for the payment of compensation to its employees.

18. Duquesne is a member of the American Warehousemen's Association, Merchandise Division, with offices at 222 West Adams Street, Chicago, Illinois, and has for many years been such a member. This is a national organization of merchandise warehousemen. Pursuant to Title I of the National Industrial Recovery Act, 48 Stat. 195, a Code of Fair Competition for the Merchandise Warehousing Trade was approved on behalf of the President of the United States on January 27, 1934, and by its terms became effective on February 10, 1934, and continued until May 27, 1935, when it was terminated as the result of a decision of the United States Supreme Court. This Code was No. 232. On January 31, 1934, Duquesne applied for a Certificate of Participation under the Code. On February 13, 1934, it was assigned Certificate No. 34-135, which was in the form of a display card featuring the NRA Code "Blue Eagle" and bearing the serial number assigned to the member of the trade to which it was issued. The participation of Duquesne in the Code of Fair Competition
48 for the Merchandise Warehousing Trade continued throughout the duration of the Code.

19. In the valuation of property of the Railroad by the Interstate Commerce Commission pursuant to Sec. 19a of Part I of the Interstate Commerce Act—22 Valuation Reports, entire volume—these warehouses are not classified as properties of the Railroad used for common carrier purposes.

20. Since August 28, 1935, Duquesne has not been engaged in the non-casual operation of equipment or facilities or the performance of non-casual service, other than trucking service, in connection with the transportation of property by railroad or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad.

Conclusions of Law

Duquesne does not now, nor has it at any time operated any equipment or facility, or performed any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad; and is not now, and has not at any time been an "employer" within the meaning of Section 1(a) of the Railroad Retirement Act.

Discussion

It does not seem necessary that I cite in detail all of the various arguments, opinions, precedent cases and other material developed by the parties at interest in this
49 case. Reviewing previous decisions of the Board, I find no case similar in all respects to the present one. The contention of Counsel for Duquesne that the Baltimore Fidelity case is distinguishable is well taken. It cannot be ignored that Baltimore Fidelity acted as agent for its controlling carrier in the active solicitation of freight, and that its employees were considered to be carrier employees, granted carrier employee privileges and were carried on carrier pay rolls. While these factors in and of themselves may not be determinative of coverage they contribute to the total from which coverage is concluded.

Conscientious consideration of all the facts indicates that the services performed by Duquesne are in commercial storage only, and are not services in connection with the transportation of property by railroad. The services rendered are not even incidental to Pennsylvania Railroad

transportation. Duquesne renders a commercial storage service to the owners of goods. It acts in the owner's name, delivery to Duquesne is delivery to the owner. Delivery to Pennsylvania by Duquesne is delivery from the owner. The owners may deal with the goods as they choose while in the possession of Duquesne. The services performed by Duquesne occur either before transportation has begun or after transportation has ceased.

The record establishes that the storage-in-transit provisions published in Pennsylvania's tariffs do not result in a storage in transit by the Railroad. There is no holding out on the part of the carrier to perform such service. Pennsylvania's published tariffs extend only the right to through rates as to certain commodities transported over its lines when those commodities are accorded off-line storage in transit by the owner. The actual handling in storage service is rendered by Duquesne for account of the owner of the goods. There is no contract as between Pennsylvania and the owner or shipper for warehouse services. The governing tariff of the Railroad expressly provides that during such storage the custody and possession of the property shall be that of the consignee or owner. Duquesne's activities are again those of a purely commercial warehouse.

Similarly the facts substantiate the conclusion that Duquesne's loading and unloading services do not constitute a service in connection with transportation. In this case they are not a common-carrier obligation. The governing tariff makes it clear that the carrier has not held itself out to render the services and in fact does not render such service either directly or indirectly inasmuch as Duquesne acts for the owner.

With respect to damaged, refused, unclaimed and overfreight Duquesne takes complete possession upon delivery to it by Pennsylvania. For its services Duquesne charges the railroad ten per cent of the gross proceeds of the sale with deductions for necessary expense for reconditioning and handling. The activities engaged in here may occur as a result of transportation but do not constitute a service in connection with transportation. Freight of this class has ceased to be a part of the flow of goods. This service is no link in the chain of transportation but is an enterprise, proper for a commercial warehouse.

In our Annual Report for the year 1938, Chapter X, page 142, a general statement of the law with respect to carrier affiliates is made as follows:

"Storage of property received for a carrier and awaiting transportation by the carrier, or awaiting delivery by the carrier following transportation, is an employer service; but performance of the usual commercial storage and warehouse business is not."

The activities of Duquesne are clearly outside the scope of this general statement. Throughout the record it is plain that Duquesne does not store or receive goods for a carrier but stores and receives goods for the owners as their agent. Likewise goods delivered to Duquesne are not awaiting delivery following transportation. Delivery has been accomplished and transportation has ceased upon receipt by Duquesne. As to carload freight, delivery is accomplished upon the placing by the Railroad of the car upon the private siding of Duquesne. This is in accordance with long established practice.

The arguments against coverage advanced by Counsel for Duquesne, I believe, are convincing and well founded on the facts and I agree that Duquesne is not a covered employer. The record, when analyzed carefully and completely reveals, not a company rendering services in connection with transportation as a part of the railroad industry but rather a commercial warehouse. This commercial warehouse is not directly related, functionally and economically, to the performance of Pennsylvania's transportation obligations but, in fact, has only such relation to transportation as is common to the commercial warehouse business.

It is well known legislative history that the Retirement Act was framed in agreement between management and labor. A study of that history leaves no doubt that the intent of the parties was to cover those employers who are engaged in the transportation of property while the property is in the possession of the Railroad. The particular words "in connection with" found their way in the Retirement Act from the Interstate Commerce Act through the Railway Labor Act. In the Commerce Act they occur in Secs. 1(3)(a); 1(5); 6(7); and 15(13). And in placing these words in the Retirement Act the limiting words "by railroad", not necessary in the Commerce Act,

were carefully added. With respect to associations, bureaus, agencies or organizations controlled and maintained wholly or principally by two or more employers, the words are "in connection with or incidental to railroad transportation". The difference in limitation is not unimportant.

The words "in connection with" when used in relation to railroad transportation have been defined by the Interstate Commerce Commission and by the courts, and in every instance these words have been held to cover services which are a part of the railroad transportation itself. In the case of *N. Y. C. & H. R. R. Co. v. General Electric Co.*, 146 N. Y. Supp. 322, the words were "renders any service connected with such transportation". The court said this:

> "* * * I understand that the defendant urges that the wording of section 15, 'if the owner of property transported under this act directly or indirectly renders any service connected with such transportation or furnishes any instrumentality used therein,' etc., includes this service in question; that the service for which the owner may receive compensation from the carrier under this provision need not be a part of the transportation itself, but only connected with it. I conclude, however, that the expression 'connected with' is a synonym of 'a part of'; it does not mean something, in addition to transportation, that touches, or is attached to, transportation. A common carrier of prop-
> 53 erty cannot include in its charge for transportation an item which is not a part of transportation, and it was not intended by said provision to require the carrier to pay for a service which it was not bound as a carrier of property to render and for which it could not charge. * * *" p. 327.

Affirmed 219 N. Y. 227. Certiorari denied, 243 U.S. 636.

I understand it to be an established rule of statutory construction as laid down by the Courts that in reaching an interpretation of a statute every effort is to be made to give some effect to all the language used. Also, it is not to be assumed that Congress has included in any of its enactments language that is either meaningless or superfluous. Now, it seems to me, that if any effect is to be given to that additional description following the words "in connection with the transportation of passengers or property

by railroad", we must reach the conclusion, not only that the word "transportation" is used in this Act in its accustomed and well understood sense of an actual carriage of persons or property, but also that the phrase "in connection with the transportation of passengers or property by railroad" means, having to do directly with such transportation by railroad. Not to give that effect to this added clause is to ignore it altogether.

CONCLUSION

It is my opinion and I conclude that Duquesne conducts a commercial warehouse business and has not been, at least since August 28, 1935, an employer within the meaning of Section 1(a) of the Railroad Retirement Act.

54

This form is to be used only by the secretary of the Board or as otherwise specifically directed by the board.	Form No. G-21 United States of America Railroad Retirement Board Transcript of Board Order's	Transcript No. Special Page 1 of 1 Page Date Transcript Released

I certify that the following is a true and correct transcript of Board Order numbered 43-93 transcribed from the record of proceedings of February 11, 1943

LORINE M. FISHER
Acting for the Secretary of the Board

B.O. 43-93

Rendering decision in the Matter of Duquesne Warehouse Company, Jurisdictional Docket No. 18

The Board hereby renders the decision set forth in the Decision of the Board, in the Matter of Duquesne Warehouse Company, Jurisdictional Docket No. 18, after consideration of the record and arguments therein.

55 DUQUESNE WAREHOUSE COMPANY

Philadelphia, Pa.
February 17, 1939.

Mr. David B. Schreiber
Assistant General Counsel
Railroad Retirement Board
Washington, D. C.
Dear Sir:

Agreeable to your request, we are forwarding herewith Questionnaire-Form LQ-2 (Revised) for this Company.

Very truly yours

F. J. Fell, Jr.
Fell
Comptroller.

Enclosure.

56 DUQUESNE WAREHOUSE CO.

Answers to Railroad Retirement Board
Questionnaire Form LQ-2 (revised).

QUESTION 1.

State:

(a) Name of respondent.
(b) Address of respondent's principal office.
(c) Name of officer authorized to answer questions regarding the status of respondent under the Railroad Retirement Act.

ANSWER

(a) Duquesne Warehouse Company.
(b) 1617 Pennsylvania Blvd., Philadelphia, Pennsylvania.
(c) E. W. Smith, President, Pennsylvania Station, Pittsburgh, Pa.

QUESTION 2

(a) State date of incorporation of respondent.
(b) Under laws of what state or territory was respondent organized?
(c) If a consolidated, merging or reorganized company, name all constituent merged or predecessor companies in chronological order, giving the dates of

each consolidation, merging, or reorganization; also names of companies leased, or used under contract showing dates.

(d) If respondent has at any time operated under any other name or names than those stated above, give such names and dates operated thereunder.

ANSWER

(a) August 1, 1906.
(b) Commonwealth of Pennsylvania.
(c) Not a consolidated, merging or reorganized company; no companies leased nor used under contract.
(d) Respondent has never operated under any other name.

QUESTION 3

(a) Respondent is requested to attach a copy of its organic document; (namely, charter, constitution, articles of association, etc.), together with amendments and by-laws.

(b) State fully the purpose of incorporation or organization.

(c) State whether or not the respondent has always adhered to its original purposes. If not, explain fully the changes which have taken place and dates thereof.

ANSWER

(a) Copies of the following documents are attached:
Articles of Association—Exhibit 1 (A)
By-Laws —Exhibit 2

57 (b) The conducting and carrying on of the business of storage, warehousing and handling of goods, wares and merchandise and other property intended for transportation, distribution, storage, sale or otherwise.

(c) Respondent has always adhered to its original purposes.

QUESTION 4

(a) Has respondent been at any time subject to the control, direct or indirect, of any express company, sleeping-car company, or carrier by railroad? If so, state:
(1) The name of the controlling company or com-

panies (whether a corporation, individual, or partnership) giving dates of such control.

(2) The form of control, sole or joint.

(3) Whether control was direct or indirect. If indirect, the name of the intermediary through which control was established.

(4) The manner in which control was established and the extent of such control.

(b) Has the respondent been at any time under common control with an express company, sleeping-car company, or carrier by railroad? If so, state:

(1) The name of the controlling company, giving date of such control.

(2) Whether control was direct or indirect.

(3) The manner in which control was established.

(4) The extent of such control.

(5) The name of the express company, sleeping-car company, or carrier by railroad, with which it was under common control.

ANSWER

(a) The Pennsylvania Railroad Company is the sole owner of the outstanding capital stock of respondent and has owned such stock since the issuance thereof.

(b) No.

QUESTION 5

Are, or were at any time, any of the officers or directors of the respondent also officers or directors of express companies, sleeping-car companies, or carriers by railroad? If so, show the positions held with respondent and such other companies or carriers, giving names of such companies or carriers and period in which such joint relationship existed.

ANSWER

The following officers or directors of the respondent are at the present time also officers or directors of the Pennsylvania Railroad Company:

58 Positions held with:

Name	Respondent	The Pennsylvania R. R. Co.
E. W. Smith	President and Director	Vice President
W. S. Franklin	Director	Vice President
J. Taney Wilcox	Secretary	Secretary
J. Gordon Watson	Assistant Secretary	Assistant Secretary
Geo. H. Pabst, Jr.	Treasurer	Asst. Vice President and Treasurer
H. W. Schotter	Assistant Treasurer	Assistant Treasurer
John Pemberton, Jr.	Assistant Treasurer	Assistant Treasurer
F. J. Fell, Jr.	Comptroller	Vice President and Comptroller
Elmer Hart	Assistant Comptroller	Deputy Comptroller
A. R. Meredith	Real Estate Agent	Real Estate Agent

QUESTION 6

(a) Describe in detail (including dates, and names of railroads) the operation of any equipment or facilities, or the performance of any services by respondent in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad.

(b) Describe in detail all respondent's operations not covered by Question 6(a) above.

(c) Attach copies of all contracts between respondent and any railroads.

Note: This question should be answered fully. A brief answer will not serve the Board's purpose.

ANSWER

(a) Under arrangements made by respondent with shippers and consignees, the respondent unloads, stores, reloads and handles other transit details at East Liberty, Pa., and Pittsburgh, Pa., for the account and convenience of said shippers and consignees, in connection with carload shipments of sugar entitled to storage-in-transit privileges under Pennsylvania Railroad Tariff I.C.C. 100. (Fourteenth revised page 388; copy attached, marked Exhibit 3) Respondent has performed such service since January 1, 1935.

Under arrangements made by respondent with shippers and consignees, the respondent during the period August 1937 to May 15, 1938 unloaded, stored, reloaded

and handled other transit details at Erie, Pa., for the account and convenience of said shippers and consignees, in connection with carload shipments of newsprint paper entitled to storage-in-transit privileges under Pennsylvania Railroad Tariff I.C.C. 100 (Fifth revised page 415; copy attached, marked Exhibit 4.) Such storage service is no longer performed but respondent stands ready to resume the service should the need therefor arise in the future.

(b) Respondent primarily conducts an independent warehouse operation completely segregated from the carrier business of The Pennsylvania Railroad Company. The warehouse operations consist of the storing and handling of commodities for tenants and patrons of the respondent.

59 Inbound cars are consigned to patrons and tenants of respondent in care of respondent, and are considered as delivered by the railroad company when placed at a designated point on the respondent's sidings. The unloading and handling in storage of such commodities is performed by the respondent for the account of its tenants and patrons. On outbound shipments, the storage of commodities and the loading of cars is performed by the respondent for the account of its tenants and patrons and delivery to the railroad company is considered as having been accomplished when loading has been completed and bill of lading signed. The foregoing applies to carload traffic.

With respect to less carload shipments, inbound, the respondent picks the shipments up at a designated point on the railroad company's station platform, the same as is done by any other consignee. The storage of such shipments in the warehouse of respondent is performed by the respondent for the account of its tenants and patrons. On outbound less carload shipments, the respondent, for the account of its tenants and patrons, makes delivery to the railroad company; delivery being considered as having been consummated when the bill of lading is signed.

Under contract with The Pennsylvania Railroad Company, the respondent accepts from the railroad company at Pittsburgh, Pa., such "over" freight, damaged refused freight and damaged unclaimed freight as may

be turned over by the railroad to the respondent for sale or other disposition. The respondent pays the Railroad the freight and other charges that have accrued upon such shipments. Out of the proceeds from the sale of such freight, the respondent retains a commission of 10% upon the amount thereof, deducts certain necessary expenses incident to reconditioning or transporting such freight and pays the balance of the gross proceeds to the Railroad Company.

The respondent from time to time also sublets space to tenants upon such terms and conditions as may be mutually agreed upon.

(c) Copy of contract dated and effective February 1, 1922, providing for the handling and disposition of over freight, damaged refused freight and damaged unclaimed freight by the respondent, is attached.

QUESTION 7

Attach statement of respondent's revenues received during the past three years, showing separately revenues received from operations covered by Question 6(a) above, and those received from operations covered by 6(b) above, itemizing amounts received under each heading.

ANSWER

Revenues received from operations covered by Question 6(a) above:

	1936	1937	1938
Storing and handling shipments accorded storage-in-transit privileges ...	$59,570.40	$30,239.93	$29,836.01

60 Revenues received from operations covered by Question 6(b) above:

	1936	1937	1938
General commercial storage	$ 63,011.60	$ 91,545.99	$73,702.99
Sale of damaged merchandise	8,599.00	11,409.00	8,881.86
Subleasing of available space to tenants ...	32,732.00	24,967.00	16,035.17
	$104,342.60	$127,921.99	$98,620.02

QUESTION 8

(a) State approximate percentage during each of the three years of respondent's total physical plant devoted to operations covered by Question 6(a) above.

(b) State separately for each of the past three years the approximate total of employee man-hours devoted to operations covered by Question 6(a) and 6(b) above. If figures as to man hours are not available, give approximate number of employes engaged in each of such operations.

ANSWER

	1936	1937	1938
(a) Operations at Pittsburgh, Pa., and East Liberty, Pa.	30%	12.5%	12.5%
Operations at Erie, Pa.	—	100. %	100. %

(b) Approximate number of employes engaged in operations covered by Question 6(a):

	1936	1937	1938
Storing of shipments accorded storage-in-transit privileges	28	14	14

Approximate number of employees engaged in operations covered by Question 6(b):

	1936	1937	1938
General commercial storage	30	42	42
Sale of damaged merchandise	3	3	3
Subleasing of space to tenants	4	4	4
	37	49	49

Figures as to man hours are not available. The number of employes engaged in various operations as shown above have been estimated on basis of the approximate number of men who would be required on a full-time basis to perform the work necessary in the various operations. As a practical matter, employes are frequently shifted from one class of work to another.

61 QUESTION 9

(a) List all railroad equipment in service of respondent at present date, such as freight, mail, express, combination or work cars, or locomotives.

(b) Has respondent ever used such equipment? (Explain)

(c) Has respondent always used such equipment? (Explain)

ANSWER

(a) None
(b) No.
(c) ——

QUESTION 10

Has respondent been a party to freight or passenger tariff concurrences, or powers of attorney filed with the Interstate Commerce Commission? (If so, state total number filed during respondent's existence, names of railroads in connection with which they were filed, the dates they were filed, the dates between which they were effective, and indicate whether they were filed under Part I or Part II of the Interstate Commerce Act.)

ANSWER

No.

QUESTION 11

Give the docket numbers or citations of all Court, Commission or Board decisions which would be helpful in determining the status of respondent under the Railroad Retirement Act.

ANSWER

None.

QUESTION 12

(a) Was respondent or any of its predecessors under Federal control? During what period?
(b) Did respondent receive deficit benefits under Section 204, or guaranty benefits under Section 209, of the Transportation Act of 1920?

ANSWER

(a) No.
(b) No.

QUESTION 13

(a) Is the respondent a common carrier?
(b) Is the respondent a department of any common carrier? (Explain)

62

ANSWER

(a) No.
(b) No.

QUESTION 14

(a) Is it the opinion of the responsible officers of the respondent that it is an "employer" within the meaning of the Railroad Retirement Act of 1937? Why? (Respondent may, if it desires, attach a brief in support of its opinion.)

(b) Does this opinion apply to the status of the respondent during its entire existence? If not, for how long and between what dates?

ANSWER

(a) No. It is the opinion of the officers of the respondent that it is not an "employer" within the meaning of the Railroad Retirement Act of 1937. Respondent is principally engaged in the development of its own independent warehouse operation. Such operation is completely segregated from the carrier business of The Pennsylvania Railroad Company and consists of the storing of commodities for its tenants and patrons, and the subleasing of offices to tenants in connection therewith. The warehouse operations of respondent in Pittsburgh, Pa. and East Liberty, Pa. are at the present time conducted in space which it leases from the Pennsylvania Railroad Company, as follows:

Warehouse and office portions of inbound and outbound freight station at the Duquesne Freight Station, Pittsburgh, Pa. Rental $26,880. per annum, plus water rent, insurance, light, heat and power. Lease effective May 10, 1937; terminable by either party upon 3 months' notice.

Warehouse at inbound freight house at East Liberty, Pa. Rental $5,544.00 per annum, plus cost of electric current in basement. Covered by two leases effective April 1, 1935 and May 1, 1935, respectively; both terminable by either party upon 30 days' notice.

Employes of respondent are (1) carried on the pay rolls of, and receive their pay checks from, the respondent; (2) covered by a separate working agreement with the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes (copy of agreement attached, marked Exhibit

(6); and (3) supervised solely by respondent through its Superintendent. Employes of respondent are not accorded free transportation by any railroad company.

(b) Yes.

E. W. SMITH
E. W. Smith
President.

63 EXHIBIT No. 1(A)

To the Governor of the Commonwealth of Pennsylvania:
Sir:

In compliance with the requirements of an Act of the General Assembly of the Commonwealth of Pennsylvania, entitled "An Act to provide for the incorporation and regulation of certain corporations," approved the 29th day of April, A. D. 1874, and the several supplements thereto, the undersigned, all of whom are citizens of Pennsylvania having associated themselves together for the purpose hereinafter specified, and desiring that they may be incorporated, and that letters patent may issue to them and their successors according to law, do hereby certify:

1st. The name of the proposed corporation is Duquesne Warehouse Company.

2d. Said corporation is formed for the purpose of conducting a storage and warehouse business.

3rd. The business of said corporation is to be transacted in the County of Allegheny, Commonwealth of Pennsylvania, with its principal office in the City of Philadelphia, Commonwealth of Pennsylvannia.

4th. Said corporation is to exist Perpetually.

5th. The names and residences of the subscribers and the number of shares subscribed by each, are as follows:

Name.	Residence.	No. of Shares
Samuel Rea,	Bryn Mawr, Pa.	100
Charles E. Pugh,	Overbroow, Pa.	40
John B. Thayer,	Haverford, Pa.	30
W. H. Barnes,	Philadelphia, Pa.	20
A. J. County,	St. Davids, Pa.	10

65 6th. The number of directors of said corporation is fixed at Five and the names and residences of the directors who are chosen directors for the first year are as follows:

Name,	Residence.
Samuel Rea,	Bryn Mawr, Pa.
Charles E. Pugh,	Overbrook, Pa.
John B. Thayer,	Haverford, Pa.
W. H. Barnes,	Philadelphia, Pa.
A. J. County,	St. Davids, Pa.

7th. The amount of the capital stock of said corporation is $10,000 divided into 200 shares of the par value of $50, and $1,000, being ten per centum of the capital stock, has been paid in cash to the Treasurer of said corporation, whose names and residence are:

Taber Ashton, Swarthmore, Pa.

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SAMUEL REA (Seal)
CHAS. E. PUGH (Seal)
JOHN B. THAYER (Seal)
W. H. BARNES (Seal)
A. J. COUNTY (Seal)

State of Pennsylvania, } ss:
County of Philadelphia. }

Before me, a Notary Public in and for the county aforesaid, personally came the above named W. H. Barnes, Samuel Rea, and A. J. County, who, in due form of law, acknowledged the foregoing instrument to be their act and deed for the purposes therein specified.

Witness my hand and Seal of office, this fifteenth day of June, A. D. 1906.

[SEAL.] LEWIS NEILSON

State of Pennsylvania, } ss:
County of Philadelphia. }

Personally appeared before me, this fifteenth day of June, A. D. 1906, W. H. Barnes, Samuel Rea, and A. J. County, who being duly sworn, according to law, depose and say that the statements contained in the foregoing instrument are true.

SAMUEL REA
W. H. BARNES
A. J. COUNTY

Sworn and subscribed before me, the day and year aforesaid.

[SEAL.] LEWIS NEILSON

66 241 Aug 13 1906 27657

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Application of

DUQUESNE WAREHOUSE COMPANY

Executive Chamber,

Harrisburg, Aug 1 1906

To the Secretary of the Commonwealth:

Having examined the within application and found it to be in proper form, and within the purposes of the class of corporations specified in section two of the act, entitled "An act to provide for the incorporation and regulation of certain corporations," approved April 29th, A. D. 1874, and the several supplements thereto, hereby approve the same, and direct that letters patent issue according to law,

(Illegible)

Governor.

SECRETARY'S OFFICE.

Pennsylvania, ss:

Enrolled in Charter Book, No. 94 Page 241 Pd 2.50

Witness my hand and Seal of office, at Harrisburg this 1st day of August A. D. 1906.

ROBERT MCAFEE

Secretary of the Commonwealth.

Commonwealth of Pennsylvania, }
County of Allegheny, } ss:

Recorded on this 13 day of August A. D., 1906 in the Recorder's Office of said County in Charter Book, Vol. 41 Page 237 Given under my hand and the Seal of the said Office the day and year aforesaid.

JOHN A. FAIRMEN

Recorder.

67 DUQUESNE WAREHOUSE COMPANY

BY-LAWS

Adopted by the Board of Directors
10th September, 1906,
with amendments to and including
14th January, 1938

68 DUQUESNE WAREHOUSE COMPANY

BY-LAWS

Article I.

Principal Office.

Section 1. The Principal Office of the Company, and also the offices of the President, the Secretary, and the Treasurer, with the books and papers thereto belonging, shall be at Philadelphia, Pennsylvania.

Article II.

Stockholders.

Section 1. The annual meeting of the stockholders shall be held at the Principal Office of the Company in Philadelphia on the first Monday in April in each year, unless that day be duly designated as a legal holiday, in which event said meeting shall be held on the first day following which is not a legal holiday.

Section 2. Special meetings of the stockholders may be called at any time by order of the Board of Directors; and the President, on the request in writing of any number of stockholders representing not less than one-tenth in interest, shall call a special meeting of the stockholders, stating in the notice thereof specifically the objects of the meeting; and the objects stated in such notice, and no other, shall be acted on at such special meeting.

Section 3. At least two weeks' notice shall be given of the time when, and the place where, the annual or any special meeting of the stockholders is to be held, such notice to be signed by the Secretary of the Company, and to be

given in one or more newspapers published in Philadelphia, Pennsylvania, except when a meeting of the stockholders shall be called to take action on a subject, or subjects, 69 in regard to which an Act of Assembly specifically provides how notice shall be given.

Section 4. At each such annual meeting an election shall be held for four Directors, who shall be stockholders to the extent of not less than five shares, and a majority of whom shall be citizens of the Commonwealth of Pennsylvania, and who shall be chosen by a majority of the stock represented at the meeting, and who shall continue in office for one year and until their successors shall be duly elected and qualified.

Section 5. At all meetings of the stockholders fifty per cent. of the capital stock issued and outstanding, represented by the holders in person, or by proxy, shall constitute a quorum.

Section 6. A roll of the stockholders in alphabetical order, together with the number of shares held by each, shall be made by the Secretary, or by such other officer as may be duly designated custodian of the books containing this information, and laid before the stockholders at each of their meetings.

Section 7. The date of record for stockholders entitled to vote at the annual meeting shall be five days prior to the date of such annual meeting.

Section 8. The Board of Directors may fix in advance a date, not exceeding forty days preceding any special meeting or election of stockholders, or the date for the payment of any dividend, or the date for the allotment of rights, or the date when any exchange or conversion or exchange of capital stock shall go into effect, as a record date for the determination of the stockholders entitled to vote at any such special meeting or election, or entitled to receive payment of any such dividend, or any such allotment of rights, or exercise the rights in respect of any such change, conversion or exchange of capital stock.

Section 9. Authority to represent at a stockholders' meeting any non-attending stockholders shall be evidenced by a proxy duly executed. Partnerships may sign in the

name of the partnership, and the signature of the
70 firm by any member thereof shall be valid. No proxy shall be valid for more than two months from the date thereof.

Section 10. All elections by the stockholders shall be by ballot, each share entitling the holder thereof to one vote in person or by proxy. The elections shall be conducted by three judges appointed by the Board of Directors, or, in the event of the Board of Directors failing to appoint, or the judges by it appointed failing to attend, judges shall be appointed by the stockholders present. The judges of election shall be stockholders in the Company. They shall, before entering upon their duties, take and subscribe an oath or affirmation that they will discharge the duties of their office or appointment with fidelity, and that they will not receive any vote but such as they verily believe to be legal. They shall certify to the result of the election conducted by them; and such certificate shall be recorded in the minute books of the corporation and filed with the archives of the Company.

Section 11. The stockholders of the Company may, at any meeting duly called and convened for the purpose, by a vote of three-fourths of all the stock, remove any Director or officer of the Company, and may then proceed to fill the vacancy, or vacancies, so caused.

Section 12. At each annual meeting of the stockholders there shall be presented a financial report as of the closing of the preceding fiscal year, duly verified by the Comptroller. The report need not be sent to the stockholders and no other verification shall be required.

Article III.

Directors.

Section 1. The government and direction of the affairs of the corporation shall be vested in a Board of four Directors, who shall be elected annually by the stockholders, as prescribed in Article II, and who shall hold office for one year and until their successors are duly elected and qualified.

71 Section 2. The Board of Directors shall have full power, and it is hereby expressly authorized, to increase, or decrease, the number of Directors, from time to

time without requiring a vote of the stockholders; provided, however, that the number of Directors shall never be less than three.

Section 3. The Board of Directors, elected at any annual meeting, shall meet on the date thereof, or within ten days thereafter, for organization, and shall then elect from among their number a President and one or more Vice-Presidents. They shall also elect a Secretary, and a Treasurer.

All the officers named in these By-Laws, except those provided for above, shall be appointed by the President subject to confirmation by the Board and hold office at the pleasure of the Board, and subject to the right of removal herein prescribed.

Section 4. Meetings of the Board of Directors shall be held at such time and place as the Board may, from time to time, designate.

A meeting may be called at any time by order of the President, or upon the written request of three members of the Board.

A majority of the Board shall constitute a quorum.

Section 5. The order of business at all meetings of the Board of Directors shall be as follows:

When a quorum appears the President shall call the Board of Directors to order.

The minutes shall be read, and considered as approved if there be no motion to amend them.

Reports of Committees.

Reports of Officers of the Company.

Miscellaneous Communications.

Unfinished Business.

New Business.

In the absence of the President, and Vice-Presidents, at any meeting, the Board of Directors may appoint one of their own number to act as presiding officer.

Section 6. The Board of Directors shall have power to fill any vacancy occasioned by death, resignation, incapacity or refusal to act, of any of their numbers, and shall likewise have power to remove from office or position any officer of the Company.

Article IV.

Officers.

President.

Section 1. The President shall have general supervision, direction and control, subject to the paramount authority of the Board of Directors, of all affairs of the Company, its property and business, and of all departments of its service.

He shall preside at all meetings of the Board of Directors, and preserve order, and regulate debate thereat, according to parliamentary rules, and appoint all Committees not otherwise ordered by the Board of Directors.

He shall also attend generally to the Company's executive business, and be, ex officio, a member of all Committees.

He shall have general control of all the officers of the Company, and shall prescribe their duties when not otherwise duly designated or specified.

Vice-Presidents.

Section 2. The Vice-Presidents shall, in case of the absence or disability of the President, exercise and perform all the powers and duties of the latter, and shall also exercise such other powers, and perform such other duties, as may be prescribed in the By-Laws or assigned to him by the President, or the Board of Directors.

Secretary.

Section 3. The Secretary shall be present at all meetings of the Board of Directors, and of the Committees thereof, and shall record all the votes of the corporation and the minutes of its transactions in a book to be kept for that purpose. He shall notify each member of all meetings of the Board of Directors, and of the Committees thereof; and furnish the Chairman of each Committee with a copy of the resolution appointing such Committee, and shall perform such other duties as the President or the Board of Directors may, from time to time require. The issue and transfer of certificates of the capital stock of the Company and the books showing the ownership thereof shall be under

his charge. He shall have charge of all books, maps,
73 letters, and records pertaining to his office, including all contracts authorized by the Board of Directors and shall have custody of the corporate seal of the Company.

The Secretary shall perform such other duties as may be assigned to him by the President, Vice-Presidents, or the Board of Directors.

He shall be sworn for the faithful performance of his duties, and shall be aided by one or more Assistant Secretaries.

Assistant Secretaries.

Section 4. The Assistant Secretaries shall act for the Secretary in his absence, and perform such other duties as may be assigned to them by the Secretary, the President, the Vice-Presidents, or the Board of Directors.

They shall be sworn for the faithful performance of their duties.

Treasurer.

Section 5. The Treasurer shall have charge and custody of the funds and securities of the corporation, and shall deposit the funds of the corporation to its credit in such depositories as the Board of Directors may from time to time designate, and funds so deposited shall be withdrawn only by check or draft signed by the Treasurer, an Assistant Treasurer, or Assistant to the Treasurer. Checks may be signed by such other persons as a Vice-President, the President or the Board may designate. Checks in payment of dividends and interest, voucher-checks and drafts for wages may have the signature of the Treasurer imprinted thereon by a signing device under conditions approved by the President or a Vice-President.

The Treasurer shall have authority, and such authority is hereby conferred to receive and to give receipt and full acquittance for, and make draft for, any and all amounts payable or which may become payable to this Company from any source or on any account whatsoever, in whatever form such payments may be made, and to endorse all checks, drafts or warrants drawn or endorsed to its order.

The Treasurer shall keep such books of account as may be required to show the receipt and disposition of all the moneys of the Company.

74 The Treasurer shall also perform such other duties as may be assigned to him by the President and Board

of Directors, and may be aided by one or more Assistant Treasurers, and Assistant to the Treasurer.

Assistant Treasurers

Assistant to the Treasurer.

Section 6. The Assistant Treasurers and Assistant to the Treasurer shall assist the Treasurer in the performance of his duties, and shall act for him in his absence.

Comptroller.

Section 7. The Comptroller shall keep in his office a general set of books containing a complete record of all the business transactions of the Company.

The Comptroller shall as often as necessary make an examination of the accounts of any officer, agent, or employe intrusted with the handling or care or money of the Company. It shall be the duty of the Comptroller to know that all money belonging to the Company collected from any source, by any officer, agent, or employe in properly accounted for and promptly paid into the Treasury, and that all accounts of the Company are properly and promptly settled.

The Comptroller, one of the Assistant Comptrollers, or such person as the President or Board may designate to sign for the Comptroller, shall approve for payment all vouchers, and only when bill for voucher shall have been approved in pursuance of proper authority by the President, a Vice-President, General Agent, or Superintendant, or such officer or person as the President or Board may designate to sign for any of the above-named officers.

The Comptroller shall see that all bonds required by the Board from officers, agents, or employes for the faithful performance of their duties are given, which bonds shall be retained by him and shall only be released upon a complete and satisfactory settlement of the accounts covered by them, unless otherwise ordered by the Board.

There shall be filed in the office of the Comptroller a record of all contracts, leases, and agreements affecting the revenues of the Company, and he shall be furnished by the proper officers with the necessary information in regard thereto.

He shall perform such other duties as may be assigned

to him by the President, the Vice-Presidents, or the
75 Board, He shall be aided by one or more Assistant Comptrollers.

Assistant Comptrollers.

Section 8. The Assistant Comptrollers shall act for the Comptroller in his absence and perform such other duties as may be assigned to them by the Comptroller, the President, the Vice-Presidents, or the Board.

Auditor of Disbursements.

Section 9. The Auditor of Disbursements shall, under the direction of the Comptroller, have immediate charge of all accounts relating to disbursements.

He shall examine the accounts for all the disbursements of the Company by voucher before payment is made, and see that bills are returned in due form and distributed to their proper accounts.

He shall not audit any bill for voucher unless it is certified to by the proper officer, and approved in pursuance of proper authority by the President, a Vice-President, General Agent, or Superintendent or such officer or person as the President, or Board, may designate to sign for any of the above-named officers.

All vouchers shall be signed by the Auditor of Disbursements, the Assistant Auditor of Disbursements, or such person as the President or Board may designate to sign for the Auditor of Disbursements, and certified to as having been examined, found correct and registered

All vouchers when receipted by the payees shall be returned to the Auditor of Disbursements and filed in his office.

He shall report to the Comptroller all deviations from the system of accounts prescribed for the disbursements of the Company.

He shall be aided by an Assistant Auditor of Disbursements, who shall act for him in his absence.

Real Estate Agent.

Section 10. The Real Estate Agent shall have custody of all deeds, releases and records of the real estate of the Company and the plans or maps thereto relating, and shall

examine and approve all conveyances and leases of real estate to, or from, the Company before execution, and have the same duly recorded when necessary.

76 Leases for a term of one year or less, and for a rental not exceeding six hundred dollars per annum, may be executed on behalf of the Company by the Real Estate Agent, and the corporate seal, duly attested, shall be affixed thereto.

Leases for a longer period than one year, or for an annual rental exceeding six hundred dollars, shall be approved by the Board and executed on behalf of the Company by the President, or a Vice-President, and the corporate seal, duly attested, shall be affixed thereto.

General Agent.

Section 11. The General Agent shall be responsible for the efficient management of all the warehouses of the Company and shall exercise a direct supervision thereover. Under the direction of the President, Vice-President or Board of Directors, he shall have charge of the Commercial and Operating Departments of the Company, approve bills covering disbursements pertaining to those Departments, and forward them to the Auditor of Disbursements for voucher.

He shall render such statements of the Company's business as may be required from time to time, and perform such other duties as may be assigned to him by the President, the Vice-Presidents, or the Board.

He shall be aided by a Superintendent.

Superintendent.

Section 12. The Superintendent, under the direction and approval of the General Agent, shall conduct the Commercial and Operating Departments of the Company, appoint all employes therein, and have the power of suspension for cause, and shall approve for voucher bills covering disbursements pertaining to those Departments.

He shall be responsible for the collection of all earnings of the Company, and shall deposit all moneys received by him to the credit of the Company in such depositories as the Board may designate, and shall make report thereof to the Treasurer and the Comptroller.

He shall attend to making such arrangements as shall increase the traffic of the Company, and shall examine and report all claims upon the Company for loss, damage and overcharge, to the General Agent, for disposition.

He shall, under instructions from the General Agent, issue rates and make contracts for handling traffic, see that all such contracts are fulfilled, keep such statements
77 of traffic as may be found desirable, sign all warehouse receipts, and perform such other duties as may be assigned to him.

The Superintendent shall give bond, with such corporate surety and in such sum as may be approved by the Board, for the faithful performance of his duties.

Bookkeeper.

Section 13. The Bookkeeper shall countersign all warehouse receipts, keep a record of all issues and cancelations thereof, and shall, under the direction of the Superintendent, keep such books and accounts at the Company's warehouse as may be required by the Superintendent, the Treasurer or Comptroller.

The Bookkeeper shall give bond, with such corporate surety and in such sum as may be approved by the Board, for the faithful performance of his duties.

Additional Officers, Agents and Employes.

Section 14. In addition to the officers elected by the Board of Directors, there may be appointed by the President such other officers, agents and employes as may, in his judgment, be deemed necessary for the effective transaction of the business of the Company, subject to the approval of the Board of Directors at their next meeting subsequent to such appointments.

Section 15. The compensation of the officers and employes, and payment thereof, shall be fixed and made either by the Board of Directors, or in such manner and by such agencies as they may prescribe.

Article V.

Issue and Transfer of Stock.

Section 1. Certificates of stock, in such form as may be adopted by the Board of Directors, shall be issued to the

stockholders, when signed by the President, or a Vice-President, Secretary or an Assistant Secretary, authenticated by the seal of the Company, and in the absence of any one of the aforesaid officers, or in any other emergency that may arise, the certificates may be signed for such officers by such person or persons as the President may designate with the approval of the Board, or, in the ab-
78 sence of the President, by such other officer as the Board may appoint.

Section 2. Stock shall be transferred by the holder thereof, or by the legal representative of such holder, in person, or by attorney duly authorized, only on the books of the Company, at the office of the Secretary, or that of such other officer of the Company as may be duly designated custodian of the said books, according to such forms as the Board of Directors may prescribe, upon the surrender of the certificate, or certificates, representing the holding intended to be transferred. The certificate, or certificates, surrendered shall be canceled at the time of transfer.

Section 3. Any person, or persons, desiring a certificate of stock to be issued in lieu of one lost, stolen, or destroyed, shall, after applying to the Secretary of the Company for the necessary forms, advertise such loss, theft, or destruction, in one or more newspapers published in Philadelphia, Pennsylvania, twice a week for four weeks, and any such person, or persons, nonresident of Philadelphia, shall, in addition thereto, advertise in like manner in a newspaper published at, or near, his, her or their residence if such paper be published twice a week, if only once a week, then in four successive numbers thereof, stating the number and date of the certificate lost, stolen, or destroyed, the number of shares represented thereby, and that application is about to be made to the Board of Directors for a certificate in lieu thereof. The applicant shall then furnish the Board of Directors with an affidavit, or affirmation, describing the certificate, its loss, theft, or destruction, and its advertisement in conformity herewith, accompanied by a copy of the advertisement, and also a bond of indemnity, with satisfactory personal or corporate security, in at least double the amount of the certificate, against any damage that may arise from issuing a new certificate; whereupon the Board of Directors may order (one month after the date of the appearance of the last advertisement) the issue

of a new certificate, of the same tenor and amount with the one alleged to be lost, stolen, or destroyed, therein specifying that it is in lieu thereof.

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Article VI.

Corporate Seal.

Section 1. The corporate seal of the Company shall be of such design as the Board of Directors may from time to time adopt. It shall be in the custody of the Secretary.

Article VII.

Duplicate Checks, Vouchers, etc.

Section 1. All applications for the issue of duplicate scrip, checks, vouchers, or other obligations of the Company, in lieu of originals alleged to be lost, stolen, or destroyed, shall be in writing and embrace a full and detailed statement describing the document, and giving the time, place and manner of the alleged loss, theft, or destruction, and shall be signed and sworn to by the applicant, and forwarded through the proper channel to the Board of Directors by the head of the Department issuing such certificates or obligations. If the amount involved is $100. or over, the Board of Directors alone shall have power to authorize the issue of a duplicate, but if less than $100., a duplicate may be issued on the authority of the President or a Vice-President. Before any duplicate shall be issued, the applicant shall give bond, with corporate surety satisfactory to the Board of Directors, in double the amount or value involved, to indemnify the Company against the presentation or use of the original.

Settlement of Bills.

Section 2. The President and Vice-Presidents are authorized to approve all bills for voucher covering disbursements of every character made by the Company.

The General Agent or Superintendent are authorized to approve bills for voucher covering disbursements pertaining to the Commercial and Operating Departments.

All vouchers which shall have remained, or may hereafter remain, unused for a period of sixty days shall be returned to the Treasurer for cancelation, and a report made at the

same time of the facts in connection therewith to the executive officer who shall have approved for voucher the bill covering such proposed disbursement, and the same
80 shall be forthwith canceled and turned over by the Treasurer to the Comptroller, unless, in the judgment of such executive officer, it is to the interest of the Company to hold the same uncanceled, in which case they shall be held for a further period of sixty days and then canceled, unless otherwise ordered by the Board.

Article VIII.

Adoption and Alterations of By-Laws.

Section 1. Subject to the foregoing By-Laws, and not inconsistent with any existing law, the Board of Directors shall have the power, and it is hereby expressly conferred upon them by the stockholders, to make, alter, or amend and rescind all By-Laws, necessary for conducting the business of the Company by the vote of not less than two-thirds of the entire Board, excepting Article VIII hereof and those Articles, or any portions thereof, which embody the requirements of the Law, but such By-Laws, or any provision thereof, made, altered, amended or rescinded by the Board of Directors, shall from time to time be submitted to the stockholders for approval, and may be altered or repealed by the stockholders at any Annual Meeting, or upon notice at any special meeting, and when so amended or repealed shall not be re-established by the Directors without the approval of the stockholders.

EXHIBIT No. 3

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Fourteenth Revised Page 388
Cancels
Thirteenth Revised Page 388

Section No. 23
I. C. C. 100 I. R. C. 10 III. C. C. 15 M. P. U. C. 10 Pa. P. U. C. 50 W. Va. 20 Ohio 15

THE PENNSYLVANIA RAILROAD COMPANY

RULES GOVERNING TRANSIT PRIVILEGES ON SUGAR, CARLOADS, AT EAST LIBERTY AND PITTSBURGH, PA.

See Rule V-1

DESCRIPTION OF ORIGIN AND DESTINATION TERRITORY

In order to be entitled to transit privileges accorded under this tariff, the entire movement must conform to the following application and the P. R. R. receives a road haul to and from the transit point, except as provided in Item 7.

Item No.	Origin Territory	Route	Destination Territory
1	Stations in Trunk Line and New England Territories, as defined in Rule 150; also stations in Carolina and Southeastern Territories, as defined in Rule 150, received from connections at Potomac Transfer.	P. R. R. Pittsburgh, P. R. R.	Stations on the P. R. R. and connections on and west of the P. R. R., Erie, Pa., to Washington, Pa., through Pittsburgh, Pa., where the through rates apply via Pittsburgh, Pa., including stations on the P. R. R. from Stoneboro to New Castle, Pa.; also stations on the P. R. R., between Pittsburgh (exclusive) and Butler, Pa. (inclusive), and stations on connecting lines beyond Butler, Pa.; also stations on the P. R. R. and Monongahela Railway between Pittsburgh, Pa. (exclusive) and Fairmont, W. Va. (inclusive) through McKeesport and Brownsville Jct., Pa.; also stations on the P. & L. E. R. R. from East California to Homestead, Pa. (exclusive).
2	Stations on the P. R. R. and connections west of Pittsburgh, Pa.	P. R. R. Pittsburgh, P. R. R.	Stations on the P. R. R. and connections east of Pittsburgh, Pa., where the through rates apply via Pittsburgh, Pa.
3	Baltimore, Md.	P. R. R., Pittsburgh, P. R. R.	Stations on the P. R. R. from Kiskiminetas Jct., Pa., to Buffalo, N. Y., through Red Bank, Oil City and Corry, Pa., and stations on the P. R. R. from Corry to Erie, Pa.
4	The term transit house (warehouse) as used in connection with this transit privilege at East Liberty and Pittsburgh, Pa., is understood to include one or more units under one ownership or control, whether located in the same or different sections of East Liberty and Pittsburgh, Pa., within P. R. R. switching limits.		

APPLICABLE AT TERRE HAUTE, IND.

Item No.	Origin Territory	Route	Destination Territory
5	Stations on the P. R. R. and connections on and east of the P. R. R., South Bend, Ind., to Louisville, Ky.	P. R. R. Terre Haute, P. R. R.	Stations on the P. R. R. and connections west of the Indiana-Illinois State Line.
6	Origination on or received from connections at stations west of Terre Haute, Ind.	P. R. R. Terre Haute, P. R. R.	Stations on the P. R. R. and connections on and east of the P. R. R., South Bend, Ind., to Louisville, Ky., through Frankfort, Terre Haute and Indianapolis, Ind.

APPLICABLE AT TOLEDO, OHIO

APPLICABLE AT TOLEDO, OHIO

Item No.	Origin Territory	Route	Destination Territory
7	Stations on Trunk Line and New England Territories, as defined in Rule 150; also stations in Carolina and Southeastern Territories received from connections at Potomac Transfer.	P. R. R. Toledo, P. R. R. and/or connections.	Stations on the P. R. R. and connections on and west of the P. R. R., Detroit, Mich., to Cincinnati, Ohio, through Columbus, Ohio, also Mansfield, Ohio.
8	Stations on the P. R. R. and connections on and west of the P. R. R., Detroit, Mich., to Indianapolis, Ind., through Butler, Logansport and Frankfort; also stations south of the Ohio River when received from connections at East St. Louis or Effingham, Ill.	P. R. R. Toledo, P. R. R.	Stations on the P. R. R. and connections on and east of the P. R. R., Detroit, Mich., to Columbus, Ohio, through Bucyrus.

APPLICABLE AT YOUNGSTOWN, OHIO

Item No.	Origin Territory	Route	Destination Territory
9	Stations in Trunk Line and New England Territories, as defined in Rule 150; also stations in Carolina and Southeastern Territories received by the P. R. R. from connections at Potomac Transfer.	P. R. R. (Lines East of Pittsburgh.) Pittsburgh, Pa., Youngstown, Ohio, P. R. R.	Stations on the P. R. R. and connections on and west of the P. R. R. from Ashtabula Harbor to Cincinnati, Ohio, through Warren, Alliance Jct., Bayard, Newcomerstown, Trinway, Zanesville and Morrow, Ohio. Stations on the P. R. R. west of Youngstown to Niles, Ohio, also from East Liverpool to Bayard, Ohio, and from East Palestine to Alliance Jct., Ohio.
10	Stations on the P. R. R. and connections on and west of the P. R. R., Mackinaw City, Mich., to St. Louis, Mo., through Fort Wayne, Columbia City, Logansport and Terre Haute, Ind.	P. R. R. Youngstown, Ohio, P. R. R.	Stations on the P. R. R. and connections on and east of the P. R. R., Erie, Pa., to Pittsburgh, Pa., through New Castle and Rochester, Pa.

APPLICABLE AT ZANESVILLE, OHIO

Item No.	Origin Territory	Route	Destination Territory
11	Stations in Colorado, Nebraska, Wyoming and Utah, when received by the P. R. R. from connections at Chicago, East St. Louis, Peoria, Ill., or Effner, Ind.	P. R. R. Zanesville, P. R. R.	Stations on the P. R. R. and connections on and east of the P. R. R., Trinway, Ohio, to Buffalo, N. Y., through Steubenville, Ohio, Rochester, New Castle, Oil City and Corry, Pa.

For explanation or abbreviations, see page 8.

∆Reduction.

Issued June 30, 1937.
G. P. SHAW, Chief of Tariff Bureau,
15 North 32nd Street, PHILADELPHIA, PA.

AGENT'S INDEX No. 55 (23—60266) (900) Effective August 1, 1937.
(Formerly Tariff File C-86)

EXHIBIT No. 4.

82

Section No. 29
I. C. C. 100 I. R. C. 10 Ill. C. C. 15 M. P. U. C. 10 Pa. P. U. C. 50 W. Va. 20 Ohio 15

THE PENNSYLVANIA RAILROAD COMPANY

Fifth Revised Page 415
Cancels
Fourth Revised Page 415

RULES GOVERNING TRANSIT PRIVILEGES ON MATCHES, CARLOADS, AT STATIONS SHOWN ON PAGE 414

For General Rules and Regulations, refer to Rules 5 to 240, pages 41 to 47

Rule No.	SUBJECT	EXPLANATION
AB-1	Definition	Matches, carloads, originating at Wadsworth, Ohio, may be stopped in transit for storage at: Chicago, Ill., for re-shipment to stations west of the Illinois-Indiana State Line and on and west of the west bank of Lake Michigan. Youngstown, Ohio, for reshipment to points east where rates are applicable point of origin to final destination through transit point. Toledo, Ohio, for reshipment to points beyond Toledo to which through rates are applicable via Toledo. Matches, carloads, originating at Akron, Ohio, and Barberton, Ohio, may be stopped for storage at: Youngstown, Ohio, for reshipment to stations on the P. R. R. and connecting lines on and east of the P. R. R. from Erie, Pa., to Pittsburgh, Pa., through New Castle, Pa.; and Rochester, Pa. ♦(Will not apply on traffic destined to or moving via points in Southern Freight Association Territory. See Rule 150.) ♦Toledo, Ohio, for reshipment to points beyond Toledo to which through rates are applicable via Toledo.
AB-2	Time Limit.	The period of time allowed for transit privilege will be twelve (12) months from the date of unloading into the transit house. At the expiration of the time limit transit privilege shall absolutely cease and the applicable rates to and from the transit point will apply.
AB-3	Transit Charge.	The transit charge shall be three and one-half (3½) cents per 100 pounds, which shall be in addition to the through rate.
AB-4	Transit Rate.	The through rate to be applied shall be the lawfully published rate on Matches, carloads, from original point of shipment to final destination, in effect via transit point at time of initial shipment from point of origin.

RULES GOVERNING TRANSIT PRIVILEGES ON NEWSPRINT PAPER, CARLOADS, AT ERIE, PA.

For General Rules and Regulations, refer to Rules 5 to 240, pages 41 to 47

Rule No.	SUBJECT	EXPLANATION

Rule No.	SUBJECT	EXPLANATION
AB-5	Definition.	Newsprint Paper, carloads, originating at Millinocket, Maine, may be stopped in transit for storage at Erie, Pa., for reshipment to Pittsburgh, Pa. Routing from Millinocket, Maine, must be via connecting lines to Buffalo, N. Y., thence P. R. R. Privileges expires December 31, 1937. ①♦Newsprint Paper, carloads, originating at Three Rivers, Quebec, may be stopped in transit for storage at Erie, Pa., for reshipment to Pittsburgh, Pa. Routing from Three Rivers, Quebec, must be via Canadian Pacific Ry. to Hamilton, Ontario, Toronto, Hamilton & Buffalo Ry., to Welland, Ontario, M. C. R. R. to Buffalo, N. Y., thence P. R. R. Privileges expire December 31, 1937.
AB-6	Time Limit.	The period of time allowed for transit privilege will be six (6) months from date of unloading into the transit house, at expiration of the time limit transit privilege shall absolutely cease and the applicable rates to and from transit point will apply.
AB-7	Transit Charge.	The transit charge shall be five (5) cents per 100 pounds which shall be in addition to the through rate.
AB-8	Transit Rate.	The through rate to be applied shall be the lawfully published rate on Newsprint Paper, carloads, from Millinocket, Maine, to Pittsburgh, Pa., in effect via transit point at time of initial shipment from Millinocket, Maine. ①♦The through rate to be applied shall be the lawfully published rate on Newsprint Paper, carloads, from Three Rivers, Quebec, to Pittsburgh, Pa., in effect via transit point at time of initial shipment from Three Rivers, Quebec.

♦Reduction.

♦Increase.

①Effective October 22, 1937. Issued on five (5) days' notice under permission of the Interstate Commerce Commission No. 164083 of October 12, 1937.

For explanation of abbreviations, see page 8.

83 EXHIBIT NO. 5

SALVAGE FRT. CONTRACT

Whereas, the Pennsylvania Railroad Company has, and from time to time hereafter will have, over freight, damaged refused freight and damaged unclaimed freight at various stations along its lines of railroad; and

Whereas, the Pennsylvania Railroad Company and the Duquesne Warehouse Company mutually desire to provide for the handling and disposition of such over freight, damaged refused freight and damaged unclaimed freight by said Duquesne Warehouse Company upon the terms and conditions hereinafter set forth:

Now, therefore, said Pennsylvania Railroad Company, as party of the first part and hereinafter called "Railroad Company", and Duquesne Warehouse Company, as party of the second part and hereinafter called "Warehouse Company", mutually covenant and agree each with the other as follows:

First. Any such over freight, damaged refused freight and damaged unclaimed freight, except live stock, bulk freight or perishable freight, as the Railroad Company may desire to have handled and disposed of by the Warehouse Company in pursuance of this agreement, shall be transported by the Railroad Company to the City of Pittsburgh, State of Pennsylvania, and there delivered to the Warehouse Company in the following manner:

Immediately upon the arrival of any lot or lots of any of such freight at said City of Pittsburgh the proper agent of the Railroad Company shall immediately notify the Warehouse Company thereof and of the place in said city where the Warehouse Company may receive the same and the Warehouse Company shall thereupon promptly call for such lot or lots of such freight and remove the same to its warehouse in said City of Pittsburgh, first paying to the Railroad Company any and all lawful freight and other charges that may have accrued and that may then be due upon such lot or lots of freight at the time of the delivery thereof to the Warehouse Company.

Whenever any lot or lots of such freight may be delivered to the Warehouse Company as aforesaid, the Warehouse Company shall concurrently give to the proper agent

of the Railroad Company a receipt in duplicate for each and every lot of such freight, and shall place on the freight bill and freight receipt and on said receipt in duplicate
84 a lot number which lot number shall also be placed with paint, crayon or other suitable means for marking on each lot or piece of freight covered by the respective receipt and freight bill aforesaid.

Second. The Warehouse Company shall keep a detailed and accurate record of all sales made by it and a description of each piece, parcel or lot of freight so sold, the amount received therefor and all expenses in connection with each and every such sale and shall, upon request of the Railroad Company, transmit to the Railroad Company, in duplicate, complete and accurate copies of such record; and upon like request the Railroad Company shall have the right and be entitled to inspect the books, records, papers, warehouse and premises of the Warehouse Company during working hours of any business day, and the Warehouse Company hereby expressly agrees to give to any agent or representative of the Railroad Company appointed for that purpose ready, convenient and complete access to such books, records, papers, warehouse and premises.

Third. Out of the gross proceeds realized by the Warehouse Company from each sale, the Warehouse Company shall receive a commission of ten per cent (10%) upon the amount thereof and shall have credit for and deduct the amount of money, if any, actually paid by the Warehouse Company for reconditioning any such piece, parcel or lot of freight, and shall also have credit for and deduct drayage charges, if any, actually paid by it for transporting such freight from the station of the Railroad Company to the Warehouse Company's warehouse, and shall also have credit for and deduct all freight and other charges paid by the Warehouse Company to the Railroad Company as hereinbefore provided, and the balance of said gross proceeds then remaining shall be paid by the Warehouse Company to the Railroad Company not later than ten days after date of sale.

Fourth. In the event that either party hereto shall, prior to the sale of any such freight, ascertain and determine the true owner of said freight, then the Warehouse Company shall upon written instructions from the Railroad Company so to do deliver such freight to the true owner thereof upon the payment by said true owner to the Ware-

house Company of all lawful accrued freight and other charges thereon which the Warehouse Company shall have paid to the Railroad Company as hereinbefore provided.

Fifth. In the event that the total gross proceeds
85 realized from any sale of such freight do not equal the amount of the lawful freight and other charges paid by the Warehouse Company to the Railroad Company as aforesaid, plus the ten percent. (10%) upon the amount of such gross proceeds which the Warehouse Company is entitled to receive as aforesaid, plus the amount, if any, actually paid by the Warehouse Company for reconditioning such freight as aforesaid, and plus the drayage charges, if any, actually paid by the Warehouse Company as aforesaid, then in any such event the Warehouse Company shall receive credit for the difference in the accounting hereunder between it and the Railroad Company.

In the event any lot or lots of such freight delivered to the Warehouse Company by the Railroad Company in pursuance of this agreement shall be or become so worthless as to be unsalable, then in such event the Warehouse Company shall dispose of such unsalable lot or lots of such freight in such manner as the Railroad Company may direct.

Sixth. Nothing in this agreement shall be deemed or construed to obligate the Railroad Company to pay to the Warehouse Company any other or further compensation than the ten per cent. (10%) upon the amount of gross proceeds realized from sales of the said freight covered by this agreement made by the Warehouse Company as herein provided, except if and when any of said freight is returned by the Warehouse Company upon the order of the Railroad Company, and then in such event the Warehouse Company shall receive from the Railroad Company the amount of the freight, drayage and expenditures for reconditioning actually paid by the Warehouse Company and the reasonable or lawful storage charges of the Warehouse Company.

Seventh. The Warehouse Company shall at its own sole cost and expense keep the said freight delivered to it pursuant to the terms of this agreement insured against loss and damage by fire in such amount or amounts as will be appropriate to afford reasonably adequate protection.

Eighth. The Warehouse Company shall give to the Railroad Company a bond or bonds in the aggregate penal

sum of Five Thousand Dollars ($5000.00), with corporate surety to be approved by the Railroad Company, conditioned upon the punctual payment by the Warehouse Company to the Railroad Company of any and all sums of money that may become due the Railroad Company under and pursuant to the terms of this agreement, and also upon the faithful performance by the
86 Warehouse Company of each and all of the terms, conditions and agreements herein contained to be kept and performed by the Warehouse Company.

Ninth. The Warehouse Company shall and it hereby expressly agrees to fully protect, indemnify and save harmless the Railroad Company from and against any and all liability, claims, loss, cost, damage and expense on account of negligence of the Warehouse Company, its agents, servants or representatives, in or in connection with the handling or disposition by the Warehouse Company of any lot or lots of the said freight covered by this agreement and which may be delivered to it pursuant to this agreement.

The Warehouse Company shall also and it hereby expressly agrees to be entirely and solely responsible for all liability for personal injuries and other damages (including payments under Workmen's Compensation laws) which may be sustained by the employe or agents of the Railroad Company, the employes or agents of the Warehouse Company, or any other person or persons through the acts or negligence of the Warehouse Company, its employes or agents, in connection with or resulting from any or all of the responsibilities and duties specifically mentioned or reasonably to be implied under this agreement, as well as in connection with the operation of the Warehouse Company in the performance of this agreement.

Tenth. This agreement may be terminated at any time by either party hereto giving to the other party 180 days' notice in writing of its intention to terminate the same. Any such notice addressed to the Railroad Company shall be served upon its Warehouse Superintendent and any such notice addressed to the Warehouse Company may be served upon any available officer or agent of that company.

In Witness Whereof, the parties hereto have caused this agreement to be executed in duplicate by their respective

officers thereunto lawfully authorized as of the First day of February, A. D. 1922.

PENNSYLVANIA RAILROAD COMPANY,
By (Illegible)
Its Vice-President.

Attest:
J. L. MASON
Assistant Secretary.

DUQUESNE WAREHOUSE COMPANY
By A. J. COUNT
Its President.

Attest:
(Illegible)
Assistant Secretary.

87 EXHIBIT NO. 6.

AGREEMENT

Between

THE DUQUESNE WAREHOUSE COMPANY

and the

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

Covering

Hours of Service and Working Conditions of the Employes Therein Named.

Effective August 1, 1937.

Scope: These rules shall govern the hours of service and working conditions of the following classes of employes under the jurisdiction of the Superintendent of The Duquesne Warehouse Company.

Clerical Employes, Receiving and Delivery Clerks, Shipping Clerks, Office Boys, Messengers, Assistant Foremen, Floormen, Freight Truckers, Warehousemen, Watchmen, Janitors, Elevator Operators, Platform Cleaners, Loaders, Coopererers, and Sealers; and all other employes doing work of similar character.

Exceptions; These rules do not apply to:

Sales Agent, Chief Clerk to Superintendent, General Foreman, and Personal Clerk to Superintendent.

Rule 1. SENIORITY:

Seniority begins at the time employe's pay starts. Where two or more employes enter upon their duties at the same hour on the same day, employer shall at that time designate rank of such employes.

Rule 2. RE-ENTERING SERVICE:

Employers who leave the service voluntarily will forfeit all seniority and if subsequently

re-employed will establish a new seniority date in the manner prescribed in Rule 1.

Rule 3. SENIORITY DISTRICT:

There will be one seniority district established in each city.

Rule 4. SENIORITY ROSTER:

A seniority roster of employes showing number, name, classification or title, and date of entry in the service will be posted in places accessible to all employes affected. Rosters will be revised as of January 1st and posted in January of each year.

An employe will have sixty days from date his name first appears on the roster to appeal his roster date or relative standing thereon, except that in the case of an employe off duty on leave of absence, sickness, disability, or suspension at the time the roster is posted, this time limit will apply from the date the employe returns to duty.

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If no appeal is taken within the sixty-day period, future appeals will not be entertained unless the employe's roster date or his relative standing is changed from that first posted. A note will be placed on each roster showing date posted and time limit of appeal.

Each position coming within the scope of these rules will be designated by a symbol or number. Bulletins advertising such positions will show symbol or numbers of positions advertised.

Copy of list showing symbols or numbers of positions, together with rate of pay applicable thereto, will be posted in places accessible to employes.

Rule 5. PROMOTION BASIS:

Employes covered by these rules shall be in line for promotion. Promotions shall be based on seniority, fitness and ability. Fitness and ability being sufficient, seniority shall prevail.

Note:—The word "sufficient" is intended to more clearly establish the right of the senior employe to bid in a new position or vacancy where two or more employes have adequate fitness and ability.

Rule 6. SENIORITY OF EMPLOYES PROMOTED TO EXCEPTED OR OFFICIAL POSITIONS:

Employes appointed to or now filling excepted or official positions shall retain and continue to accumulate seniority in the district from which appointed and if they return to the service covered by these rules they may exercise their full seniority.

Individuals employed to fill supervisory or official positions subsequent to the effective date of these rules will not accumulate seniority.

Rule 7. STATUS AFTER LEAVE OF ABSENCE OR WHEN RELIEVED FROM TEMPORARY ASSIGNMENT:

An employe returning after leave of absence or when relieved from a temporary assignment, or excepted or official positions may return to his former position, providing it has not been abolished or senior unassigned employe has not exercised seniority rights thereon; or may upon return or within five days thereafter, exercise seniority rights on any position bulletined during such absence. In the event employe's former position has been abolished or senior unassigned employe has exercised rights thereon, the returning employe may exercise seniority over any junior employe if exercised within five days. Employe displaced will exercise seniority in the same manner.

Rule 8. REDUCING AND INCREASING FORCES:

When reducing forces, seniority rights shall govern. Employes classified as clerical employes, receiving and delivery clerks, shipping clerks, office boys, messengers, and assistant foremen shall be given at least six days ad-

vance notice of force reduction or abolition of positions. Employes whose positions are abolished may exercise their seniority rights over junior employes. Other employes affected may exercise their seniority rights in the same manner.

90 When forces are increased or vacancies occur, employes shall be returned to service in order of their seniority. Qualified available furloughed employes shall be given preference on a seniority basis to all extra work.

Employes desiring to avail themselves of this rule must file their name and address with their supervisory officer within ten days from the date they are out off from regular positions and advise promptly of any change in address. Employes failing to return to the service within seven days after being notified (by mail or telegram sent to the address last given) or give satisfactory reasons for not doing so, will be considered as having forfeited their seniority.

Any employe who has been laid off for lack of work for a year or more shall be considered as having lost his seniority rights.

Rule 9. RATING POSITIONS:

Positions (not employes) shall be rated and the transfer of rate from one position to another shall not be permitted.

Rule 10. BULLETINS:

New positions or vacancies will be promptly bulletined at places accessible to all employes in the seniority district, bulletin to show symboi number, location, title, and description of position, assigned hours, and rate of pay. Employes desiring such position will file their applications with the designated official within five days from date of posting, and assignment will be made andn posted within five days thereafter.

Rule 11. TEMPORARY ASSIGNMENT:

Positions or vacancies of thirty days or less shall be considered as temporary and may be filled without bulletining.

Rule 12. FORMER POSITION VACANT:

When an employe bids for and is awarded a permanent position, his former position will be declared vacant and bulletined. Such employe can file bid for position he has just vacated and same shall be considered, provided no other employe bids for same.

Rule 13. DECLINING POSITION:

Employes declining promotion or declining to bid for a bulletined position shall not lose their seniority.

Rule 14. FAILURE TO QUALIFY:

Employes awarded bulletined positions and failing to qualify within thirty days shall retain all of their seniority, may bid on any bulletined position thereafter, but may not displace any regularly assigned employe.

Rule 15. STARTING TIME:

Regular assignments shall have a fixed starting time which shall not be changed without at least thirty-six hours advance notice to the employes affected.

When the established starting time of a regular position is changed one hour or more for more than six consecutive days, employe affected may, within five days thereafter, exercise seniority.

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Change in starting time due to Daylight Saving Time does not constitute a change comprehended by this rule.

Rule 16. CHANGES IN RATES:

Except when changes in rates result from negotiations or adjustments of a general character, the changing of a rate of a specified position shall constitute a new position.

Rule 17. LEAVE OF ABSENCE:

When the requirements of the service will permit, employes on request will be granted leave of absence for a period not to exceed ninety days in any one twelve-month period. Absence on account of sickness or disability is not a leave of absence under this rule. An employe on leave of absence, who engages in other employment automatically forfeits seniority.

Permission for leave of absence will be confirmed in writing and local chairman furnished copy of same.

Rule 18. LEAVE OF ABSENCE—COMMITTEE WORK:

Employes will upon request be given necessary leave of absence for committee work or handling affairs of their organization without impairment of seniority.

Rule 19. DAY'S WORK AND OVERTIME:

Eight hours work, exclusive of meal period, shall constitute a day. Time and one-half will be paid for all time worked on any day after employe has been on duty eight hours.

Rule 20. FLUCTUATING WORK:

Employes who report for fluctuating work and are required to perform service will be paid for actual time worked or held on duty, with a minimum of four hours at the pro-rata rate.

Rule 21. MEAL PERIOD:

The meal period shall be regularly assigned, shall be allowed between the ending of the fourth hour and the beginning of the seventh hour after starting work, and shall not be less than thirty minutes or more than one hour unless mutually agreed between the management and the duly accredited representatives of the employes.

Rule 22. CONTINUOUS WORK WITHOUT MEAL PERIOD:

For regular operation requiring continuous hours, eight consecutive hours without a meal period may be assigned constituting a day's work, in which case, twenty minutes will be allowed in which to eat without deduction in pay.

Rule 23. NOTIFIED OR CALLED:

Employes notified or called to perform work not continuous with, before or after their regular work period or on Sundays and specified holidays, shall be allowed a minimum of three hours for two hours' work or less, and if held on duty in excess of two hours, time and one-half will be allowed on the minute basis.

92 Rule 24. ABSORBING OVERTIME:

Employes will not be required or permitted to suspend work during regular hours to absorb overtime.

Rule 25. SUNDAY AND HOLIDAY WORK:

Work performed on Sundays and the following legal holidays, namely: New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas (provided when any of the above holidays falls on Sunday and the day observed by the State, Nation, or by proclamation shall be considered the holiday), shall be paid at time and one-half time. This rule does not apply to watchmen.

Rule 26. PRESERVATION OF RATES:

Established rates of pay or positions shall not be discontinued or abolished and new ones created covering relatively the same class of work, which will have the effect of reducing rates of pay or evading the application of these rules.

Employes temporarily or permanently assigned to higher-rated positions will receive

the higher rate while occupying such positions. Employes assigned temporarily to lower-rated positions will not have their rates reduced.

Rule 27. NEW POSITIONS:

When new positions are created, rates of pay will be fixed in conformity with that of existing positions of similar work and responsibility in the same seniority district.

Rule 28. ANNUAL VACATIONS:

Annual vacations with pay will be allowed as follows:

Hourly-rated employees:

After one year's continuous service—Three days.

After two years' continuous service—Six days.

Monthly-rated employes:

After one year's continuous service—Six days.

After two years' continuous service—Twelve days.

Rule 29. SATURDAY AFTERNOON RELEASE:

Only such clerical employes as are necessary for the continuous operation of the company and whose work cannot be reasonably deferred shall be required to work Saturday afternoon, and no deduction shall be made from the pay of employes thus released.

Rule 30. POSTING NOTICES:

A place will be provided in offices and departments for the posting of bulletins and notices affecting employes covered by these rules. No bulletins or notices will be posted without permission of the management.

Rule 31. MACHINES, EQUIPMENT, AND SUPPLIES:

Typewriters, mechanical devices, and other equipment and supplies will be furnished where the company requires their use.

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Rule 32. BOND PREMIUMS:

Employes will not be required to pay premiums on bonds required by the company.

93 Rule 33. DISCIPLINE AND APPEALS:

Employes will not be suspended nor dismissed without a fair and impartial trial at which they may be accompanied by an employe covered by these rules; neither will they be held off duty for minor offenses pending investigation or decision. Employes will be notified in writing ten days in advance of date suspension takes effect.

When written statements are taken in controversial matters, employes making same will be furnished with copy upon request.

Time lost pending or attending investigations will be applied against suspension. Time lost as result of appeals from discipline will not be applied against suspension.

An employe who considers that an injustice has been done him in discipline matters and who has appealed his case in writing to the Superintendent within ten days, will be given a hearing at which he may be accompanied by an employe covered by these rules to assist him in presenting his case. After his appeal has been acted upon by the Superintendent, he may if he so desires be represented before the Superintendent by his duly accredited representatives.

An employe who considers that an injustice has been done him with respect to any matter other than discipline, and who has within ten days from date of origin of such grievance, presented his case in writing to his immediate superior may, if the decision of his immediate superior, which shall be given promptly in writing, is unsatisfactory, turn the matter over direct to his duly accredited representatives, and any further handling of the matter will be by the duly accredited representatives with the Superintendent.

If the charge against the employe is not sustained it will be stricken from the record and employe will be paid for all time lost less amount earned elsewhere during the period of suspension.

Rule 34. DULY ACCREDITED REPRESENTATIVES:

Where the term "duly accredited representatives" appears in this agreement, it shall be understood to mean the regularly constituted committee and/or the officers of The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, of which such committee or officer is a part.

Rule 35. FURNISHING OF SCHEDULES:

A copy of this schedule shall be furnished by the company to each employe affected.

Rule 36. NOTICE OF CHANGE:

If a revision of any or all of these rules is desired by either the company or the duly accredited representatives, thirty days' notice in writing of the modifications desired shall be given by the party to this agreement desiring said modification and a meeting to negotiate said proposed modifications will be held as soon as practicable after the expiration of the thirty days.

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94 Dated at Pittsburgh, Pa., this Eleventh day of August, 1937.

For the Duquesne Warehouse Company:
By /s/ H. A. Bietenduefel
Superintendent.

FOR THE EMPLOYES REPRESENTED BY THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES:
By /s/ JOS. PEARSON
By /s/ MORTIMER P. SULLIVAN
By /s/ EARL A. HARSHMAN
By /s/ WILLIAM J. MAHONEY
By /s/ C. H. BIER
General Chairman.

95 RAILROAD RETIREMENT BOARD

Washington

Murray W. Latimer, Chairman — Lester P. Schoene, General Counsel

M. R. Reed
L. M. Eddy

Charles L. Hodge
Secretary

May 23, 1939

Mr. E. W. Smith, President
Duquesne Warehouse Company
1617 Pennsylvania Boulevard
Philadelphia, Pennsylvania

Dear Sir:

Thank you for Mr. Fell's letter of February 17, 1939, supplying information concerning the status under the Railroad Retirement Act of Duquesne Warehouse Company.

Duquesne, since its incorporation on August 1, 1906, has been wholly owned and controlled by the Pennsylvania Railroad Company (hereinafter called Pennsylvania). Duquesne so owned and controlled is an employer within the meaning of Section 1 (a) of the Act if it "performs any service * * * in connection with the * * * receipt, delivery, * * * transfer in transit, * * * storage, or handling of property by railroad." This is true even though the business of Duquesne may be segregated from the business of Pennsylvania.

Since at least January 1, 1935, Duquesne has engaged in the unloading, storage, reloading, and handling of property in transit on Pennsylvania performed under arrangements made by Duquesne with shippers and consignees. Such services, are undertaken under Pennsylvania Tariffs at Pennsylvania's East Liberty and Pittsburgh, Pa. freight stations in space at those stations leased to Duquesne by Pennsylvania. During the period August 1937 to May 1938, similar services were performed at Erie, Pa., under Pennsylvania tariffs. Duquesne stands ready to resume its services at Erie when the need arises. Clearly, the services described are, as you state, in connection with the receipt, delivery, transfer in transit, storage or handling of prop-

erty transported by railroad. See General Counsel's opinion on *The Long Dock Company* and cases therein cited. Payments for such employer services constitute approximately 57, 23, and 30 per cent of Duquesne's total operating revenues in the years 1936, 1937, and 1938.

96 Other operations of Duquesne regularly performed for shippers and consignees since at least August 28, 1935, include the receipt from Pennsylvania, the delivery to Pennsylvania and the loading and unloading of carload freight transported or to be transported by Pennsylvania. Except for loading and unloading the same services are performed for less than carload shipments. Such operations constitute services performed in connection with the receipt, delivery, storage or handling of property transported by railroad. General Counsel's opinion No. 1939 R.R. 4 on *Baltimore Fidelity Warehouse Company.*

The employer services thus far described account for approximately 74, 77, and 80 per cent of Duquesne's total operating revenues of $163,912, $158,160, and $128,456 for the years 1936, 1937 and 1938. Commissions for sale of damage freight for Pennsylvania and rentals from space sublet account for the remainder of Duquesne's revenues.

Duquesne's employees are frequenty shifted from one operation or service to another.

It is unnecessary to determine whether the sale of damaged freight for Pennsylvania and the subletting of space constitute employer services. It is clear at least that Duquesne is principally engaged in employer services and is, therefore, an employer within the meaning of the Act. *Baltimore Fidelity Warehouse Company, supra.* On the facts stated service for the Duquesne Warehouse Company is creditable, in accordance with Section 1 (f) of the Act, from August 1, 1906, the day of incorporation to date.

Copies of the *Long Dock Company* and *Baltimore Fidelity Warehouse Company* rulings are enclosed for your information.

Very truly yours,
(Sgd) Lester P. Schoene
Lester P. Schoene,
General Counsel

Enclosures (2)

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In reply refer to
File No. 16:0A1

SOCIAL SECURITY BOARD
Washington, D. C.

Office of the General Counsel

May 25, 1939

Hon. Lester P. Schoene,
General Counsel,
Railroad Retirement Board,
Washington, D. C.

Dear Sir:

We have received a copy of a letter dated May 19, 1939, in which you express the opinion that the Duquesne Warehouse Company, 1617 Pennsylvania Boulevard, Philadelphia, Pennsylvania, is an "employer" within the meaning of the Railroad Retirement Act.

We have informed the Bureau of Old-Age Insurance that, in the event that any claim is received based on service with the Duquesne Warehouse Company, the applicant should be informed of your ruling and should be advised that, since he may be entitled to benefits under the Railroad Retirement Act, no action will be taken by the Social Security Board with respect to his claim in the absence of further communication from the applicant with regard thereto. The Bureau of Old-Age Insurance will suggest to any such applicant that he file with your Board his application for benefits.

Very truly yours,

ROBERT P. BINGHAM
Robert P. Bingham
Assistant General Counsel

98 DUQUESNE WAREHOUSE COMPANY

Office of the President,

Pennsylvania Station,

Pittsburgh, Pa., September 11, 1939.

Railroad Retirement Board,
Washington, D. C.

Gentlemen:

Enclosed you will find your questionnaire Form LQ-2-C answered by this company, and to be used in substitution of that heretofore answered and sent you at your request. These substituted answers are sent you because since the sending to you of the earlier form as executed examination of the wording of its questions discloses that the answers do not accurately cover the inquiries, the reason being that the wording of the questions in that form is not sufficiently clear to be fully understood. And further, the questions in your present form which is enclosed bring out more adequately the purpose and object of your inquiry, and permit more accuracy in the answers to those questions.

Yours truly,

E. W. SMITH
President

Encls.

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Questionnaire Form LQ-2-C
Adopted April, '39

RAILROAD RETIREMENT BOARD

Q.—1.(a) Name and address of company.
(b) Type of organization (i. e., corporation, partnership, joint-stock company, etc.).

A.—1.(a) Duquesne Warehouse Company, 1617 Pennsylvania Boulevard, Philadelphia, Pa.
(b) Corporation.

Q.—2.(a) Date on which company organized.
(b) Name of state under whose laws company was organized.
(c) State the original purposes for which the company was organized, and any subsequent

changes in those purposes, giving dates thereof.

A.—2.(a) August 1, 1906.

(b) Commonwealth of Pennsylvania.

(c) Conducting a public warehouse business, including storage and handling of goods, wares, merchandise and other property.

Q.—3. State the names of all predecessor and successor companies of the company, if any, and their dates of organization, and if such companies are no longer in existence, the dates on which their existence was terminated.

A.—3. None.

100 Q.—4. Is the company engaged to any extent in the transportation of passengers or property? If so,

(a) State what type or types of transportation (rail, bus, truck, boat, etc.), and whether freight or passengers or both.

(b) Is such transportation performed exclusively for the company itself? If not, describe the extent to which such transportation is performed for others.

(c) Under what tariffs and other arrangements is such transportation performed?

(d) With what railroads, if any, and to what extent is transportation performed by the company coordinated with, in substitution for, or a feeder for railroad transportation?

(e) With what railroads, if any, and to what extent does the company interchange freight or passengers? Under what arrangements (through joint tariffs, contracts, etc.) are freight or passengers interchanged?

(f) Supply copies of all written contracts, and set forth terms of verbal arrangements or agreements, covering the transportation performed by the company.

A.—4. No.

Q.—5. Is the company engaged to any extent in the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage or handling of property transported by railroad? If so,

(a) Describe fully such operations.
(b) For what railroads are such operations performed?
(c) Under what tariffs, if any, are such operations performed?
(d) Furnish copies of all written contracts and set forth the terms of all verbal arrangements or agreements between the company and others, covering such operations.

A.—5. No.

101 Q.—6. Is the company engaged to any extent in the supplying of products to a railroad or railroads for use in railroad transportation business? If so,
(a) Describe fully such operations.
(b) To what railroad or railroads are such products supplied?
(c) Describe the arrangements under which such products are supplied to a railroad or railroads.

A.—6. No.

Q.—7. Is the company engaged to any extent in the supplying to a railroad or railroads of any service or services used in railroad transportation business? If so,
(a) Describe fully such operations.
(b) To what railroad or railroads are such services supplied?
(c) Describe the arrangements under which such service or services are supplied to such railroad or railroads.

A.—7. No.

102 Q.—8. Describe any other operations of the company of the same nature as those described in response to questions 5, 6 and 7 above, but performed for others than railroad companies.

A.—8. None.

Q.—9. Describe any other operations of the company not covered by the responses to questions 4 through 8, above.

A.—9. The company conducts a public warehouse business at Pittsburgh, Pennsylvania, and issues receipts under the Warehouse Receipts Act of the Commonwealth of Pennsylvania.

Q.—10. Do the answers to questions 4 through 9 apply substantially to all of the past history and organization of the company? If not, please set forth the differences.

A.—10. Yes.

103 Q.—11. Attach statement showing separately for each year since January 1, 1935,

(a) The revenues received from,
(b) The equipment used in, and
(c) The number of employees engaged in;

(1) The transportation of passengers or property. (Question 4)

(2) The receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad. (Question 5)

(3) The supplying of products to a railroad or railroads for use in railroad transportation business. (Question 6)

(4) The supplying to a railroad or railroads of any service or services used in railroad transportation business. (Question 7)

If the answers to items (1), (2), (3) and (4) are all "none" then item (5) need not be answered.

(5) Other operations of the company, itemized by type of operation.

A.—11. The answers to items (1), (2), (3) and (4) are all "none".

104 Q.—12. Cite any reference to decisions of courts or administrative bodies which may be helpful in determining the status of the company under the Railroad Retirement Act.

A.—12. *Guaranty Claim of Central Elevator & Warehouse Co.*, 72 I.C.C. 169; *Turner, Dennis & Lowry Lbr. Co.* v. *Chicago, M. & St. P. Ry. Co.*, 271 U.S. 259, 262; *Scott Bros., Inc., Collection and Delivery Service*, 2 I.C.C. M.C.C. 155, 159.

Q.—13. Furnish any additional information considered to be pertinent to an understanding of the operations of the company.

A.—13. None.

Q.—14. (a) What is the opinion of the responsible officers of the company as to whether it is an "employer" within the scope of the Railroad Retirement Act of 1937? Set forth the reasons for this opinion.

(b) Does this opinion apply to the status of the company during its entire existence? If not, set forth the reasons why it does not so apply.

A.—14. (a) It is the opinion of the officers of the Company that the Duquesne Warehouse Company is not an "employer" within the meaning of the Railroad Retirement Act of 1937. The Company is altogether engaged in its own independent commercial warehouse business, and which is completely separated from the transportation business of The Pennsylvania Railroad Company. The Warehouse Company is not a carrier by railroad subject to Part I of the Interstate Commerce Act. Nor does it operate any equipment or facility, or perform any service in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property in the course of transportation by railroad.

(b) Yes.

E. W. Smith
E. W. Smith
President

September 11, 1939.

MEMORANDUM

105 Re: Duquesne Warehouse Company.

The Duquesne Warehouse Company is a corporation of the State of Pennsylvania doing a commercial warehouse business at Pittsburgh, Pa. It holds itself out as conducting a public warehouse. It issues warehouse receipts, and is subject to the Pennsylvania Warehouse Receipts Act. Its stock is wholly owned by The Pennsylvania Railroad Company. At Pittsburgh it has two leased buildings where it conducts its business. One is at East Liberty and the other is in Pittsburgh proper. At the East Liberty house the only commodity handled is sugar. This is an account of the California & Hawaiian Sugar Refining Corporation. The sugar is partly refined in California and partly in New York. That refined in California comes east by ship to one of the eastern ports, such as Philadelphia or Baltimore, and then moves by rail to Pittsburgh which is used as a distributing point. That refined at New York moves by rail to Pittsburgh, and from there is subsequently distributed. All sugar either coming in or going out is in carlots. At the other building in Pittsburgh proper a substantial warehouse business is conducted. The business comes into the warehouse chiefly by rail, say 95%. The other is trucked in but not locally. Coming by rail, it arrives either in carlot or less. About 40% moves out by truck, and 60% by rail, either carload or less, but principally less. There are direct railroad siding connections at both East Liberty and Pittsburgh proper. And in the buildings both at East Liberty and Pittsburgh proper the railroad company maintains its own freight agencies with its separate freight agents for the receipt and delivery of carload freight and less.

The Railroad Company also delivers to the Warehouse Company freight which is damaged or refused. In making such delivery to the Warehouse Company the Railroad Company entirely severs its connection with the transportation of the property. The Warehouse Company recondi-tions the such damaged or refused freight and sells it at private sale. For its services it charges 10% of the gross proceeds of sale, with deductions for any necessary expense such as reconditioning, and remits the balance to the Railroad Company.

The buildings, both at East Liberty and Pittsburgh

proper, are owned by the Railroad Company and leased to the Warehouse Company, with the exception of those portions which are kept by the Railroad Company for freight station agencies in each building.

106 The sugar and other freight which are sent to the Warehouse Company in railroad service is consigned to the owner in care of the Warehouse Company. The Warehouse Company is thus the consignee. *Merchants' Warehouse Co.* v. *United States*, 283 U.S. 501. This is true also under the Federal Bills of Lading Act where consignee is defined as "the person named in the bill as the person to whom delivery of the goods is to be made." And delivery to the care of party is a sufficient delivery for the carrier. *City National Bank of El Paso, Texas* v. *El Paso & N. E. R. Co., et al.*, 262 U.S. 695; *Philadelphia Tapestry Mills* v. *New England S. S. Co.*, 146 N. E. 777 (Supreme Judicial Court of Massachusetts). The sugar is subject to a transit privilege covered by a tariff—P.R.R.—I.C.C. 100. A provision in that tariff is this:

> "(b) While the commodities named in this tariff are stored in transit under these rules, their custody and possession, as between carrier and the consignee or owner, shall be that of the consignee or owner."

In the handling of this sugar and other freight received by it for storage, the Warehouse Company accords the property more than just storage. In carload lots it loads and unloads when the cars are placed at the warehouse. In less than carload it accepts from the Railroad Company inbound, and ships via the Railroad Company outbound. On outbound shipments it takes from the Railroad Company bills of lading. But in accepting, in handling in the warehouse, and in shipping outbound, it renders services to the owners of the property, and for which it makes appropriate charges. For instance, in handling sugar it fills orders of the owner for distribution to the owner's customers. For example, there are two kinds of sugar—the brown and the granulated. The granulated is subdivided into cubes, powdered, etc. Again there are some 52 separate types and grades of packages. There is the cloth bag of so many pounds, and the cloth bag of other pounds. There is the paper bag of different kinds, and the paper bag of sizes. There is the individual package, and there is the carton. In filling orders, these different kinds and

types of sugar in packages have to be assembled and shipped out accordingly. This service, of course, is that of a warehouseman and not of a carrier. As to it, the Supreme Court in the *Merchants' Warehouse Co. case, supra,* said this:

> "* * * By Rule 23 of the Consolidated Freight Classification, the carriers may not distribute carloads of freight in less than carload lots, nor assemble smaller lots into carloads. By Rule 14, the carriers
> 107 confine their service with respect to carload shipments to one consignor and one consignee. The service rendered by appellants' warehouses in distributing and assembling package carload freight is thus one which a carrier is not authorized or permitted to render, even at its own public freight stations, and, if performed by it, would nullify its published rates for carload transportation service. See *New York, New Haven & H. R. R. v. Interstate Commerce Commission,* 200 U.S. 361, 26 S. Ct. 272, 50 L. Ed. 515."

Employees of the Warehouse Company are on the payroll of that company and are paid by that company. They have never been employees of the Railroad Company. They are not accorded the pass privilege; they are not entitled to become members of The Pennsylvania Railroad Voluntary Relief Department; nor may they be members of The Pennsylvania Railroad Employes Provident and Loan Association. Membership in the Relief Department is limited to employees or former employees; that in the Provident and Loan Association to employees. The employees of the Warehouse Company are members of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, and with which the Warehouse Company has a working agreement. The question at issue is whether the Warehouse Company is an employer as defined in the Railroad Retirement Act. That definition so far as here material is this:

> "(a) The term 'employer' means any carrier (as defined in subsection (m) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking

service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, * * *."

The definition in the Retirement Act of 1935 is the same as in the present Act, except that trucking service there is excluded, while in the present Act trucking service, casual service, and casual operation of equipment or facilities are excluded. But it is perfectly clear that the lan-
108 guage was taken from the Interstate Commerce Act which defines "transportation" as follows:

"* * * The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

What the Retirement Act does is to define "employer" as any carrier subject to Part I of the Interstate Commerce Act, and couples with that any company directly or indirectly owned or controlled by the carrier and which operates any equipment or performs any transportation service as that term is defined in the Interstate Commerce Act in connection with the transportation of passengers or property by railroad. The words in the definition as to receipt, delivery, elevation, etc. are words used in connection with the property which is being transported by railroad. That, of course, means property which is in the course of rail transportation but is being handled by the subsidiary company. There are instances well known where some of these transportation services are not done by the rail carriers themselves. For instance, refrigeration for some lines is done by the Fruit Growers Express Company, a railroad owned corporation. Or delivery may be made by an agency which is owned or controlled by the Railroad Company. These are transportation services performed by these other companies for the railroad com-

panies. But the property meanwhile is in the course of railroad transportation.

These particular services which are singled out by name are all coupled with the words "transported by railroad". In the Interstate Commerce Act, Sec. 1 (3), the term "railroad" is defined, and is this:

> "* * * The term 'railroad' as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of
> 109 every kind used or necessary in the transportation of the persons or property designated herein, including all feight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. * * *"

Nowhere in this definition are warehouses specifically mentioned. True, they are covered in the term "terminal facilities" where those terminal facilities are used as part of the railroad transportation. And those words "terminal facilities" are qualified by these: "of every kind used or necessary in the transportation of the persons or property designated herein." The definition throughout is limited to the property while the same is being transported by railroad. When the property is out of the possession of the carrier, in storage or otherwise, it is not in the course of railroad transportation. It may get back into railroad transportation, or it may not, but it is not there at the time. And it is significant to note that as a fact the charges of these outside warehouse companies are never filed with the Interstate Commerce Commission, and that Commission has never attempted to assume jurisdiction over the charges or practices of commercial warehouses. In fact, it has expressly disclaimed such jurisdiction, as will more fully appear in the following part of this memorandum.

The situation is this. Both the Interstate Commerce Act and the Railroad Retirement Act are based on transportation by railroad. The first covers persons and property, and the second persons. But they both relate to the same transportation. We have in the Commerce Act, Sec. 1 (3), a definition of the term "railroad". Under that definition

the term includes bridges, carfloats, depots, yards, grounds, terminals, etc., but all used or necessary in the interstate transportation of persons or property. In the same paragraph there is a definition of the term "transportation", and under that definition are included locomotives, cars, etc., and further, a specification of detailed services which go to make up this transportation. They are specifically enumerated: receipt, delivery, elevation, transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

In the Railroad Retirement Act an employer is defined as a carrier which is subject to Part I of the Interstate Commerce Act. That kind of a definition as to "carrier" takes with it the definition of the term "transportation" as found in the Commerce Act. Consequently, it was not necessary there to numerate the several transportation services such as elevation, refrigeration or storage. But it was well known to the framers of the Retirement Act that there are certain common carrier services which are not performed by the railroads themselves. *United States* v. *Fruit Growers' Express Co.*, 279 U.S. 363. But all of these services are in connection with property while in the course of transportation by railroad. It was these railroad owned or controlled companies furnishing part of the railroad transportation which it was the intention of the framers of the Retirement Act to include in the terms of that Act. In phrasing the language to include such companies, they are described as performing any service, with certain exceptions, in connection with the transportation of passengers or property by railroad. In the Retirement Act there is no definition as in the Commerce Act of the term "transportation". Consequently, the alternative was used in specifying the particular services which go to make up such interstate transportation as is contained in the Interstate Commerce Act. Hence, the present wording in the Retirement Act, which as to such services, is almost an exact duplicate of that found in the Commerce Act, but also these words in the Retirement Act, as in the Commerce Act, are coupled with the qualifying words as to transportation by railroad.

When property is consigned to the owner, care of the warehouse, the owner takes possession but the railroad makes delivery. When property is shipped out over the

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railroad by the warehouse, the warehouse acts as agent of the owner who is the shipper. But there the railroad company receives the property. In the case of carload freight, delivery is made when the car is placed on the siding of the warehouse company. In the case of less carload freight, delivery is made when the property is given to the warehouse company by the carrier. And on outbound freight receipt of the property is accepted by the railroad company when it gets the property into its possession and issues its bill of lading. But certainly, these services are neither delivery nor receipt by the warehouse company.

They are services altogether of the railroad company. 111 And that is true both in customary practice; as the situation is understood commercially; and as those words are used in the Retirement Act and the Commerce Act in relation to interstate transportation by railroad.

That the property handled by the warehouse company for storage and other purposes is not while in the possession of the warehouse company in the course of railroad transportation may perhaps be better shown by limiting our discussion to the service of storage. And we are assuming that it is transit storage. Our argument progresses in this way:

I. It is not an obligation of the railroad company to furnish general storage, and this either on its lines or off its lines.

True, storage is a service included in the term "transportation" under the definition in the Interstate Commerce Act. But that means storage only incidental to transportation, as for instance, where goods are received and forwarding is withheld pending shipping instructions. Again, where goods reach destination, the consignee is notified, the period of free time expires, and the goods are not removed. Cases covering matters of this kind are the *Detlebach case*, 239 U.S. 588, and the *Prescott case*, 240 U.S. 632. But it is decidedly not a part of the duty of the carrier to furnish general storage for the care of goods which have been transported by railroad, or which may be transported after leaving storage.

"The efficient use of freight cars is an essential of an adequate transportation system. To secure it,

broad powers are conferred upon the Commission. Compare *United States* v. *New River Co.*, 265 U.S. 533, 44 S. Ct. 610, 68 L. Ed. 1165; *Avent* v. *United States*, 266 U.S. 127, 45 S. Ct. 34, 69 L. Ed. 202; *United States* v. *P. Koenig Coal Co.* (No. 216, April 12, 1926), 270 U.S. 512, 46 S. Ct. 392, 70 L. Ed. 709. One cause of undue detention is lack of promptness in loading at the point of origin, or in unloading at the point of destination. Another cause is diversion of the car from its primary use as an instrument of transportation by employing it as a place of storage, either at destination or at reconsignment points, for a long period while seeking a market for the goods stored therein. To permit a shipper so to use freight cars is obviously
112 beyond the ordinary duties of a carrier. The right to assess charges for undue detention existed at common law. Now, they are subject like other freight charges, to regulation by the Commission. Demurrage charges are thus published as a part of the tariffs filed pursuant to the statutes."

Turner, Dennis & Lowry Lbr. Co. v. *Chicago, M. & St. P. Ry. Co.*, 271 U.S. 259, 262 (1926).

The Railroad Retirement Board itself has sensed this situation in its instructions with respect to the application of the Railroad Retirement Act as shown by the following from the Board's memorandum No. UI-S-1—COVERAGE OF "EMPLOYERS," "EMPLOYEE REPRESENTATIVES," AND "EMPLOYEES" UNDER THE RAILROAD RETIREMENT ACT OF 1937 AND RELATION TO COVERAGE UNDER THE RAILROAD UNEMPLOYMENT INSURANCE ACT, DATED OCTOBER 7, 1938:

"This brings us to the main question relating to the second requirement for carrier subsidiary coverage which is: What are and what are not services in connection with railroad transportation. The general principle applicable to this question is stated in the Board's regulations:

'Sec. 2.07. *Service or operation in connection with railroad transportation.*—The service rendered or the operation of equipment or facilities by persons or companies owned or controlled or under common control with a carrier is in connection with the transportation of passengers or prop-

erty by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, if such service or operation is reasonably directly related, functionally or economically to the performance of obligations which a company or person or companies or persons have undertaken as common carriers by railroad, or to the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad.'

* * *

"Services relating to storage to be employer service must be railroad storage, that is, the storage must be of property received for a carrier employer and awaiting transportation by the carrier employer or awaiting delivery by the carrier employer following transportation by the carrier employer. Performance
113 of the usual commercial storage and warehouse business is not an employer service. The same distinction is drawn in performance of services in connection with elevation of property transported by railroad. The operation of a grain elevator for the receipt of grain for transporting by a railroad, or for delivery of grain transported by a railroad, or for transfer of grain from one railroad to another for continued transportation is the performance of an employer service. But doing the business of a general commercial elevator does not constitute the performance of an employer service."

II. Where freight is carried to destination and not removed within a reasonable time after arrival, the right of the carrier is to place in public storage where the responsibility of the carrier entirely ceases.

Our bill of lading is published in the Consolidated Freight Classification, and hence has a tariff status. The bill of lading, Sec. 4 (a), provides that after notice of arrival, placement of the property for delivery at destination, and the expiration of free time, property not removed may be placed in public storage by the carrier; the liability of the carrier thereafter as to the property is com-

pletely extinguished. In other words, the transportation of the property by railroad, and the liability of the carrier in connection with that property is completely ended when such storage is accomplished. True, in the case of transit freight the property is not placed in storage by the carrier. But it is taken in delivery by the owner and may be placed in storage or handled otherwise by the owner as he may determine. But the point is that in all instances where property after delivery is placed in general storage, and where the warehousing is not that of the carrier, the responsibility of the carrier is entirely ended.

> "In undertaking the transportation, the defendant became liable 'for any loss, damage or injury to such property caused by it' or by any connecting carrier to whom the goods would be delivered, but this merely connected the initial carrier with responsibility to the end of the route. The nature of its responsibility was established by the contract of transportation and the obligation existing under its common law duty. It does
> 114 not appear from the evidence that the defendant omitted to perform any of the acts required by any federal statute, or at common law, or by its contract. Within a reasonable time allowed for the convenience of the consignee, the freight passed into the custody of the terminal carrier as a warehouseman and finally into a storage warehouse, and if any negligence is attributable in the premises, it should be imputed to the warehouseman not to the carrier. * * *"
>
> *Keystone Publishing Co., Appellant*, v. *Penna. R. R. Co.*, 78 Pa. Super. 486, 491 (1922).

III. In the application of the word "storage" as a part of the definition of the term "transportation", the Interstate Commerce Commission has repeatedly held it to be restricted to that storage which is incidental only to transportation.

The first case is *Guaranty Claim of Central Elevator & Warehouse Co.*, 72 I.C.C. 169 (1922). That case arose under the guarantee provisions of the Transportation Act, 1920. It was an application by the Illinois Central, and the question was whether the operations of the Warehouse Company could properly be considered as railway operations.

There, as here, the Railroad Company wholly owned the Elevator and Warehouse Company; and there, as here, the Elevator and Warehouse Company was a public facility, and with respect to two of the elevators the grain handled was entirely export. But the Commission declined to hold that the storage in the elevator was storage under the definition of "transportation" in the Interstate Commerce Act. It said this:

> "The transportation act contains no general definition of 'railroad' or of 'transportation'. The railroad and warehouse companies point out, however, that both of these terms are defined in section 1 of the interstate commerce act. In that section the term 'railroad' is said to include, *inter alia*, 'all * * * terminals and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds used or necessary in the transportation or delivery of any such property,' and the term 'transportation' to include 'locomotives, cars and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.' These definitions, placed together in the same section, are interdependent one upon the other; without the definition of 'transportation' the definition of 'railroad' is incomplete. No definition of the term 'system of transportation' appears in either the transportation act or interstate commerce act, and the definition of 'transportation' in the interstate commerce act is of doubtful value as an aid in determining the meaning of 'system of transportation' as used in section 209 of the transportation act, 1920. It is quite obvious, however, that while certain of the services performed by the Central Elevator & Warehouse Company are incidental to transportation services other of such services can not be so considered in any proper sense. The receipt and delivery of property are, of course, a part of a carrier's transportation service. Elevation and transfer in transit have frequently been found by us

and by the courts to constitute necessary steps in the transportation of various kinds of property. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U.S. 42; *Union Pacific Railroad Company* v. *Updike Grain Company*, 222 U.S. 215.

"Storage of property transported is a transportation service only to the extent that storage is necessarily incidental to transporting such property, and the term has been used in section 1 in that limited sense. As was said by the court in *State* v. *Southern Pacific Company, supra:*

> 'We think that the storage of goods by a railroad in its warehouses, as a matter incidental to its business as such, contemplates and looks to a rotation of storage as immediate and prompt as the railroad corporation can make it. * * * To be incidental business, the storage must be preliminary either to immediate transportation or immediate removal.'

"'The revenues of the warehouse company are derived on the one hand from elevation of grain and certain other services which properly pertain to transportation, and, on the other, from storage of grain for hire for indefinite periods and other services which are not transportation services, and are not actualy incidental thereto. But it seems beyond question that the
116 activities of this company which give it character and definitely establish its status are its storage or public-warehouse operations. Admittedly the reason for its incorporation was to enable it to store grain and issue storage receipts therefor. These things the railroad company could not lawfully do under the laws of Louisiana. Having been created for these particular purposes, the railroad company and its subsidiaries also turned over to it by lease agreements the services incidental to transportation, such as elevation and transfer in transit, which these carriers might have retained unto themselves. The fact that the railroad company guarantees payment of all expenses and obligations of every kind of the warehouse company and recaptures its excess earnings, if any, does not alter the outstanding fact that the railroad companies could not themselves lawfully carry on the storage or public-

warehouse business that the warehouse company is doing."

And recently in its motor carrier decisions the Commission has held to the same effect.

"Some analogies may be helpful. By virtue of section 1 (3) of part I, services by rail carriers in connection with the storage of property transported are included within the term 'transportation', and thus 'come within the jurisdiction of the Commission.' Separate charges therefor must be shown in the tariffs of the carriers. The Commission has frequently decided controversies involving the reasonableness of such charges and discriminations and the like growing out of the rendering of the services. But the warehousing companies who perform the service are not carriers subject to part I (*Guaranty Claim of Central Elevator and Warehouse Co.*, 72 I.C.C. 169) even though wholly owned subsidiaries of a rail carrier. It would not be reasonable to assert that in the event the United States Warehouse Act (39 Stat. 486) regulating the operation of warehouses, had contained a provision subjecting such operations to the jurisdiction of the Secretary of Agriculture 'except to the extent that they are subject to the Interstate Commerce Act', all warehouses which furnished any service to rail carriers could escape the jurisdiction of the Warehouse Act merely because of the fact that what they did for rail carriers was reflected in rail tariffs and passed on to the shipper as
117 rail charges. Such a conclusion is not tenable, yet the situation seems on all fours with the one herein discussed. The same thing might apply as well to elevator service, icing service, wharfage, docking, and others."

Scott Bros., Inc., Collection and Delivery Service, 2 I.C.C. Motor Carrier Cases 155, 159 (1937).

IV. The construction placed upon a statute by the body charged with its enforcement, and which has long obtained in practical application, will generally be accepted by the courts.

Logan v. Davis, 233 U.S. 613, 627; 63 F.—2d 472, 476; 54 F.—2d 122, 126.

The definition of the term "carrier" in the Railway Labor Act is this:

> "The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, * * *."

The history of the Labor Act confirms the position here taken that the definition of the term "employer" in the Retirement Act is taken from the definition of "transportation" as found in the Interstate Commerce Act. It is further clear from the history of the Labor Act that it is the intent of that Act to restrict the use of the words "receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad" to services which the railroad itself is obligated to perform. And these words in the Retirement Act are exactly the words in the Labor Act except for a change of "and" to "or" before the word "handling".

That the foregoing is true is shown by the following extracts from the hearings on amendments to the 118 Labor Act before the Senate and House in 1934. In the House the following is from the testimony of Commissioner Eastman—Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 7650, May 22-25, 1934, pp. 16-17:

> "I call attention in the first place to the fact that section 1 contains definitions. The present Railway Labor Act contains a definition at the outset of the term 'carrier', which has been subject to some doubt. I do not think it has ever been fully decided just what is covered by the definition of 'carrier' in the act as it now stands. In this bill, H.R. 9689, the definition provides that the term 'carrier' shall include any express company, sleeping-car company, carrier by rail-

road, subject to the Interstate Commerce Act; and then goes further and includes

> 'any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier".'

"Now, summing that up, it includes with those carriers subject to the provisions of the Interstate Commerce Act, i. e., all railroad companies and express companies and sleeping-car companies, and all companies which are directly or indirectly owned or controlled by the railroads and which perform service or furnish facilities in connection with transportation service performed by the railroads, and the definition includes words descriptive of such transportation service which are taken from the provisions of the Interstate Commerce Act.

"Now I should mention an amendment which has been suggested at that point: In line 4 on page 2, it has been suggested that after the word 'transportation' there should be inserted the words 'of passengers or property by railroads' and then go on with the words 'receipt, delivery, elevation,' and so forth.

"I see no objection to that amendment. The language as drawn refers to transportation of property, and this amendment is intended to make it clear that transportation of passengers is also to be included."

119. In the Senate the testimony of Commissioner Eastman was this—Hearings before the Committee on Interstate Commerce on S. 3266, April 10-19, 1934, pp. 10-11:

"In the paragraph of section 1 marked 'First', there is a change in the present definition of the term 'carrier.' This change is intended to bring within the scope of the act operations which form an integral part of railroad transportation, but which are performed by

companies which are not now subject to the Railway Labor Act. The most important illustration is found in the refrigerator-car companies, which own refrigerator cars operated by the railroads and perform certain functions connected with refrigeration service. Another illustration is found in the companies to which railroads have on occasion contracted out their maintenance work on equipment and even on way and structures. The thought is that concerns which function in this way as an integral part of the railroad transportation system should be subject to the same duties and obligations with respect to labor controveries as the railroads themselves and as the express and sleeping-car companies. This object is attained by including in the definition of 'carrier' any company 'operating any equipment or facilities or furnishing any service included within the definition of the terms 'railroad' and 'transportation' as defined in the Interstate Commerce Act.' Perhaps a better way can be found of accomplishing the desired result, but it was thought that this language would serve the purpose.

"I may say that in reading that over last night I am not sure the language does cover all companies to which railroads on occasion have contracted out their maintenance work, and it perhaps should be examined rather carefully from that point of view.

"The Chairman. I am impressed with the fact that instead of defining the terms in this bill you have defined them as defined in some other bill.

"Mr. Eastman. Yes.

"The Chairman. That is rather poor legislation, isn't it, generally?

"Mr. Eastman. Well, the definitions in the Interstate Commerce Act are, of course, definitions of long standing.

120 "The Chairman. I am not objecting to it; I am wondering if they should not be written into this bill.

"Mr. Eastman. That might, perhaps, be better. Some paraphrasing would have to be done if that were done in that way.

"The Chairman. The very fact it would have to be done is a reason that it should be done. If you define the terms of one act by another act, everybody has to dig it up.

"Mr. Eastman. I am not sure the language as it stands does cover all that it is intended to cover. I shall be glad to give it further consideration, and to indicate later any changes which I think ought to be made."

* * * * *

"Mr. Eastman. I shall discuss, first, the amendments to S. 3266 which have been proposed by the railroads.

"Section 1, paragraph first: The railroads wish to strike out the words 'any company' in line 10 of page 1. This amendment would confine the bill to the employees of express companies, sleeping-car companies, and railroads. It would eliminate companies, like refrigerator-car companies, which operate facilities or furnish service forming a part of railroad transportation. Most of the illustrations given by Mr. Clement to support his objections to the words 'any company' relate to construction work. The language in the bill would not cover outside companies engaged in such work for the railroads, as I read it. He is right in believing that it would cover trucking companies performing terminal service for the railroads. However, he approves of the wording of the present act, and that includes 'other transportation facilities used by or operated in connection with any such carrier by railroads'. It is plainly broad enough to cover terminal trucking.

"The Chairman. As I recall it, he claimed that it would affect their building of bridges and affect their contracts for all kinds of work. Is that your understanding of the definition?

"Mr. Eastman. Well, as I read the definition in the bill, as I have said here, I do not think it would cover such construction work. However, I am about to propose an amendment.

121 "While I believe that the railroad objections are largely without basis, the chairman has made a valid criticism of the definition of 'carrier' now in the bill, because it requires reference to another act. I can also see difficulties in bringing in trucking operations and certain other operations performed for railroads by outside companies, because of possible conflicts with

N.R.A. codes. It is difficult to know just where to draw the line. I am inclined to believe that for the present it would be well not to go beyond carriers and their subsidiaries engaged in transportation. So changed, the definition would read:

> 'The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company, which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad.'

"That, I may say, is some of the language in the Interstate Commerce Act.

"The Chairman. Is there some difference however? Isn't this reference here to parent, subsidiary, and affiliated, new?

"Mr. Eastman. Yes. I am confining this now to the railroad subsidiaries because of the possible conflict with N.R.A. codes if we get into the outside field. Going on with that—

> 'and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such carrier.'" pp. 145-6

122

OFFICE OF THE PRESIDENT
PENNSYLVANIA STATION,
PITTSBURGH, PA.,

December 15, 1939

Re: Railroad Retirement Act
Duquesne Warehouse Company

Mr. Murray W. Latimer, Chairman
Railroad Retirement Board
Washington, D. C.

Dear Sir:

Under date of May 23 last, Mr. Schoene, your General

Counsel, addressed a letter to Mr. E. W. Smith, President, in which letter your General Counsel expressed the opinion that the Duquesne Warehouse Company is an employer within the meaning of Section 1 (a) of the Retirement Act. Subsequent to that, and on September 15 last, and in protest against the opinion of Mr. Schoene, I appeared at the offices of the Retirement Board in Washington before Mr. Reed and Mr. Eddy, members, and Mr. Schoene, General Counsel. You were absent from Washington at the time.

At that meeting I fully explained the grounds for the position of the Warehouse Company that it is not an employer under the terms of either of the Railroad Retirement Acts, and in support submitted a memorandum setting forth in details the reasons for the position of the Warehouse Company. At the same time I filed with the Board a questionnaire, together with amended answers of the Warehouse Company to the same, and also a letter in explanation. It has been assumed that the matter is under the consideration and advisement of your Board.

The object of this letter is in further protest against the opinion of your General Counsel; and is to request that in the event the conclusion of the Retirement Board should be adverse to the position of the Warehouse Company, and in that event before any final determination or ruling or action shall be made or taken by the Retirement Board contrary to the position of the Warehouse Company the Warehouse Company be accorded full opportunity to present its case, to the end that a complete and adequate record may be fully developed.

Very truly yours

GEORGE R. ALLEN
George R. Allen
Counsel

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123

Jan 3 1940

Mr. George R. Allen, Counsel
Duquesne Warehouse Company
Pennsylvania Station
Pittsburgh, Pennsylvania

Dear Sir:

Receipt of your letter of December 15, 1939 is acknowledged. You request that, in the event that the determination of the Board on the status of Duquesne Warehouse

Company should be adverse to your contentions, Duquesne Warehouse Company be given further opportunity to submit evidence.

You can readily appreciate that orderly processes of administration are not promoted by the making of a determination that is expected to be reconsidered in the light of further evidence proffered after the determination. On the other hand, it is desirable that a determination be made on the fullest record known to be available.

Therefore, although the request to submit further evidence comes late, you are now allowed twenty days from the date of this letter in which to submit further evidence pertinent to the status of the Duquesne Warehouse Company and its employees.

Very truly yours,

MURRAY W. LATIMER
Chairman

124 BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS

Freight Handlers, Express and Station Employes

Domestic Freight Forwarding System Board of Adjustment

Cincinnati, Ohio.
January 5th, 1940.

Mr. L. M. Eddy, Member
Railroad Retirement Board,
Washington, D. C.

Dear Sir:—

There is at Pittsburgh a warehouse company known as the "Duquesne Warehouse Co." owned and controlled by the Pennsylvania Railroad whose employees are under the jurisdiction of our Brotherhood. Upon making some investigation at the local Railroad Retirement Board to find out why these employees were not considered under jurisdiction of the Railroad Retirement Act, we were advised by your local officers that the Duquesne Warehouse Co. is under the jurisdiction of the Railroad Retirement Board but as far as is known by me no deductions have been made from the pay of the employees by the management

for Railroad Retirement benefits and they are not so considered by the company.

Could you be so kind as to check into this matter and advise me the result of your investigation and any order that you might issue covering these employees?

Yours very truly,

C. H. BIER
General Chairman.

CHB/SS
CC: Mr. M. P. Sullivan

125 Jan 22, 1940

Mr. George R. Allen, Counsel
Duquesne Warehouse Company
Pennsylvania Station
Pittsburgh, Pennsylvania

Dear Sir:

As requested in your telephone conversation with Mr. Reed, you have been granted until February 15, 1940, to submit further evidence pertinent to the status of the Duquesne Warehouse Company and its employees.

Very truly yours,

MURRAY W. LATIMER
Chairman

126 Feb 5 1940

Dear Sir:

Reference is made to your letter of January 5, 1940, inquiring as to the status of the Duquesne Warehouse Company under the Railroad Retirement Act. You state that local officers of the Board have advised you that the company is under the Act, but that "so far as is known by me no deductions have been made from the pay of employees by the management for Railroad Retirement benefits and they are not so considered by the company."

On May 23, 1939, Mr. Lester P. Schoene, the Board's General Counsel, advised the company that, in his opinion, the company is an "employer" under the Railroad Retirement Act as a company owned and controlled by a "carrier employer" under the Act (the Pennsylvania Railroad Company) and engaged in the performance of certain services in connection with the transportation of property by rail-

road. Subsequently, the company protested the ruling, contending that it is not an "employer" under the Act, and that its employees are not "employees," within the meaning of the Act, of the Pennsylvania Railroad Company. In support of its protest, the company has submitted to the Board a memorandum on the company's status, and, at the company's request, it has been given until February 15, 1940, to submit such further evidence as it deems pertinent in the matter. After such materials have been furnished the Board, a determination will be made by the Board of the company's status on the basis of all the materials before it.

If in this connection, you desire to submit any data bearing on the status under the Railroad Retirement Act of the company and of its employees, such data will be given careful consideration by the Board in its formulation of an opinion in the case. In any event, you will be promptly advised of any determination made by the Board as to the status of the company and of its employees.

Very truly yours,

LEE M. EDDY

Mr. C. H. Bier, General Chairman
Domestic Freight Forwarding System
Board of Adjustment
Brotherhood of Railway and Steamship Clerks
Railway Clerks Building
Cincinnati, Ohio

127 BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS

Freight Handlers, Express and Station Employes

Domestic Freight Forwarding System Board of Adjustment

Cincinanti, Ohio.
February 7, 1940.
File 4-10-57

Mr. L. M. Eddy, Member
Railroad Retirement Board,
Washington, D. C.

Dear Sir:—

This will acknowledge receipt of your letter of Feb. 5th

advising of the present status of the *Duquesne Warehouse Co.*, Pittsburgh, as regards their coverage by the Railroad Retirement Act.

In my dealings with this company in negotiating rules and wage agreements covering its employees, and in handling disputes arising under our Agreements, it has been no secret that this company is owned, operated, and controlled by the Pennsylvania Railroad. According to information furnished me, Mr. E. W. Smith, who is Vice President of the Pennsylvania Railroad at Pittsburgh, is also President of the Duquesne Warehouse Co. and all wage and rules negotiations pertaining to the employees of the Duquesne Warehouse Co. are handled with the executive officers of the Pennsylvania Railroad in Pittsburgh as well as any disputes of any moment.

I give you this information for any use it may be to you in making your determination.

Yours very truly,

C. H. BIER
General Chairman

CHB/SS

128 DUQUESNE WAREHOUSE COMPANY

Office of the President
Pennsylvania Station,
Pittsburgh, Pa.,

February 14, 1940

Re: Railroad Retirement Act.
Duquesne Warehouse Company

The Honorable Murray W. Latimer
Chairman
Railroad Retirement Board
Washington, D. C.

Dear Sir:

In response to your letter of the 3rd ult. in this proceeding, time subsequently extended in your favor of the 22nd ult., I beg to say that enclosed herewith you will find statement of facts and memorandum of law in support of the position of the warehouse company that it is not an employer within the terms of the Railroad Retirement Act. The facts appearing in the statement of facts can be substantiated by competent proof. It is accordingly requested

that this statement of facts be made a part of the record in this proceeding. If the Board, however, is not willing to accept this statement of facts as the facts in the proceeding, then it is requested that before any ruling be made by the Board or order entered by the Board which may be adverse to the position taken by the warehouse company, a hearing be had to the end that a complete record in stenographic form may be had in the proceeding.

Very respectfully,

GEORGE R. ALLEN
George R. Allen,
Counsel

gra-h

129 Before The

RAILROAD RETIREMENT BOARD

Duquesne Warehouse Company

Transmitted with
letter of Feb. 14, 1940
from George R. Allen

Statement of Facts and Memorandum of Law in Support of the Position of the Warehouse Company That It Is Not An Employer Under the Terms of the Railroad Retirement Act.

Under date of May 23, 1939, the General Counsel of the Railroad Retirement Board addressed a letter to Mr. E. W. Smith, President, Duquesne Warehouse Company, in which it is stated that the warehouse company is an employer within the meaning of Section 1 (a) of the Railroad Retirement Act. Thereafter, by arrangement and on September 15, 1939, counsel for the warehouse company appeared before the Retirement Board, two members being present and also the General Counsel of the Retirement Board, and set forth the position of the warehouse company that it is not an employer under the terms of the Retirement Act. Counsel for the warehouse company at that time filed with the Board its memorandum in support of its position. It filed also its letter of September 15, 1939 enclosing the Board's questionnaire, Form IQ-2-C, with answers made by the warehouse company, this questionnaire and answers to be used, as stated in the letter, in substitution for the

questionnaire and answers previously submitted at the request of the Board, and this because, as stated in that letter, the wording in the previous form of the Retirement Board was not sufficiently clear to be properly understood. A copy of that letter and of the amended questionnaire and answers are here attached, marked Exhibits A and B, respectively, and made a part hereof. The warehouse company has received no communication from the Retirement Board as a result of that presentation.

Thereafter, and on December 15, 1939, counsel for the warehouse company wrote to the Chairman of the Retirement Board in protest against the conclusion of its General Counsel reached in his letter of May 23, 1939, and asked that the warehouse company be afforded full opportunity to present its case before any final determination of the Board if adverse to the position taken by the warehouse company. A copy of that letter is attached, and marked Exhibit C, and made a part hereof. The reply of the Chairman of the Retirement Board granted permission for the submission of further evidence pertinent to the status of the warehouse company and its employees. In response, this statement of facts and accompanying argument are submitted; and it is respectfully requested that the statement of facts be made a part of the record in this proceeding.

130 THE FACTS

The letter of the General Counsel of the Retirement Board asserts that the warehouse company is an employer within the meaning of the Retirement Act because the services which it performs are those in connection with the receipt, delivery, storage or handling of property transported by railroad. The language is this:

> "Since at least January 1, 1935, Duquesne has engaged in the unloading, storage, reloading, and handling of property in transit on Pennsylvania performed under arrangements made by Duquesne with shippers and consignees. Such services are undertaken under Pennsylvania Tariffs at Pennsylvania's East Liberty and Pittsburgh, Pa. freight stations in space at those stations leased to Duquesne by Pennsylvania. During the period August 1937 to May 1938, similar services were performed at Erie, Pa., under

Pennsylvania tariffs. Duquesne stands ready to resume its services at Erie when the need arises. Clearly, the services described are, as you state, in connection with the receipt, delivery, transfer in transit, storage or handling of property transported by railroad. See General Counsel's opinion on *The Long Dock Company* and cases therein cited. Payments for such employer services constitute approximately 57, 23, and 30 per cent of Duquesne's total operating revenues in the years 1936, 1937, and 1938.

"Other operations of Duquesne regularly performed for shippers and consignees since at least August 28, 1935, to include the receipt from Pennsylvania, the delivery to Pennsylvania and the loading and unloading of carload freight transported or to be transported by Pennsylvania. Except for loading and unloading the same services are performed for less than carload shipments. Such operations constitute services performed in connection with the receipt, delivery, storage or handling of property transported by railroad. General Counsel's opinion No. 1939 R.R. 4 on *Baltimore Fidelity Warehouse Company*."

The Duquesne Warehouse Company is a corporation of the Commonwealth of Pennsylvania, chartered "for the purpose of conducting a storage and warehouse business". It does a commercial warehouse business in Pittsburgh, Pa., at two locations—one at East Liberty which is in Pittsburgh, and the other in Pittsburgh proper. It issues warehouse receipts pursuant to the Warehouse Receipts Act of Pennsylvania—Act of 11 March 1909, P.L. 19. Photostat copies of two such receipts, one negotiable and the other not, are attached, and marked Exhibits D and E, respectively, and made a part hereof. Its stock is owned by The Pennsylvania Railroad Company.

131 Its operations are confined to two warehouses, one at East Liberty and the other at Pittsburgh. Both warehouses are owned by the railroad company and leased to the warehouse company with the exception of a portion of each building on the ground floor which is retained by the railroad company and used and officially designated by the railroad company as its freight agency. The railroad company maintains an agency force at each. These stations are fully equipped with tracks and other facilities for

the receipt, delivery and handling of inbound freight and outbound, both carlot and less. The operations of each are separate from the operations of the warehouse. Each warehouse has a siding where delivery is made by the railroad company in carlots to the warehouse company. The owner unloads. The warehouse company performs the work and charges the owner. On outbound carload shipments the owner loads on the same siding. The warehouse company does the work and charges the owner. On inbound deliveries and outbound shipments of less than carload freight such delivery and receipt are made and given by the railroad agency at the warehouse. Inbound the warehouse company takes the freight from the railroad platform, and outbound delivers it at the railroad platform. It receipts to the railroad inbound, and takes a railroad bill of lading outbound.

At East Liberty the only commodity handled by the warehouse company is sugar in carlots, although the agency of the railroad company at that point is open for the receipt and delivery of all freight, carload and less. The sugar is in packages. It comes into Pittsburgh by rail transportation, originating at the seaboard—New York, Philadelphia and Baltimore. It moves under regular bills of lading of the rail carrier. It is consigned to the owner, a sugar company, care of the Duquesne Warehouse Company. The warehouse company is the consignee. A typical form of such a covering bill of lading is hereto attached and marked Exhibit F, and made a part hereof. Delivery is made to the warehouse company in placing the car on the siding of the warehouse company. The railroad has then completed its transportation. The freight money is prepaid. The warehouse is used by the owner of the sugar as a distributing point. The packages are assembled in number and size to meet the requirements of the owner's trade. Outbound shipments are made by the owner and in its name. The sugar that went in is the sugar which goes out but assembled differently. A typical bill of lading covering such a movement is attached and marked Exhibit G, and made a part hereof. Inbound and outbound the sugar is carried by the railroad at carload rates. In the case of inbound shipments the owner unloads the sugar, and on outbound shipments loads the same, the work of unloading and loading being performed by the warehouse company for the owner.

This loading and unloading is required by Rule 27, Section 1 of the governing tariff, being Consolidated Freight Classification No. 13, and reading as follows, there being no exception as provided in the rule:

132 "Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at C. L. ratings or rates, except where the tariff of the carrier at point of origin or destination or stopover station (as the case may be) provides for the loading or unloading of C. L. freight by carrier."

While the freight is in the warehouse it is under the exclusive control and direction of the owner. The responsibility of the warehouse company in the custody of the sugar is that of a warehouseman. There is no responsibility of the railroad company. All services accorded the sugar, such as loading, unloading, storing, ventilating, drying, moistening, packaging and assembling, are performed by the warehouse company at the direction of the owner, and charges for such services are billed by the warehouse company against the owner and paid by it.

The appropriate tariff of the railroad company carries a transit privilege on sugar in carloads at East Liberty. That is, sugar in carloads transported by the railroad company to consignees at East Liberty may be there delivered to the consignees at the local rates, and if and when subsequently shipped out via the same railroad is entitled to be charged the through rate from first point of shipment to ultimate destination. For instance, assume that the shipment initially moves from New York to East Liberty, is delivered to consignee, is kept in storage there by the consignee for a period of three months, then either the identical sugar or like tonnage is shipped by the consignee to Chicago. Assume further, that the rate from New York to Chicago per 100 pounds is 90c, while the rate from New York to Pittsburgh is 50c, and the rate from Pittsburgh to Chicago is 50c. On the movement from New York to Pittsburgh the local rate of 50c is charged and paid. But on the outbound movement from Pittsburgh, because of the transit privilege, the through rate from New York to Chicago applies, and the shipper pays 40c additional only. There, of course, are certain policing rules, primarily to make sure that no more tonnage goes out than comes in.

The lower rate is the advantage, and is the chief factor in this transit privilege. The tariff covering the privilege is P.R.R. I.C.C. 100, the pertinent part of which is photostated and marked Exhibit H, atached hereto and made a part hereof. The master tariff carrying the rules governing I.C.C. 100 is that of L. E. Kipp, Agent, No. 226-B, I.C.C. No. A-2725. A rule of that tariff of particular consequence here is Item 295 on page 16 and reading as follows:

133 "While the shipments are stored in transit under these rules their custody and possession as between carrier and the consignee or owner, shall be that of the consignee or owner."

The transit privilege of the railroad company is not particular to any one consignee. It is restricted to commodities and locations, but is open to all receivers of those commodities at those points. For instance, transit on sugar is accorded also at Chicago, Detroit, Fort Wayne and Indianapolis; on lumber at Cincinnati, Fort Wayne and Toledo; on dairy products at Cincinnati, Cleveland, Detroit and Indianapolis; on grain at Chicago, Cincinnati, Pittsburgh and St. Louis; and on iron and steel at Ambridge, Pa., Chicago and Logansport, Ind. And at East Liberty the transit privilege is accorded canned food stuffs in addition to sugar.

At its other warehouse in Pittsburgh proper, the Duquesne also conducts a commercial warehouse business but more diversified as to commodities. The business comes to the warehouse either by rail or by truck, chiefly by rail. Such trucking is not local. When coming by rail in carlots and less, the shipments are consigned to the owners care of the Duquesne Warehouse Company as at East Liberty. In the case of carlots, the cars are placed on the siding of the warehouse, and delivery is then and there made to the consignee. Unloading is done by the owner as required by the tariff, the goods being carrier at carload rates. In the case of less than carlot shipments the freight is unloaded by the railroad from cars to the platform of the agency, and there delivery is made to the warehouse company by the railroad and appropriate delivery receipt taken. In case of outbound carlot shipments the reverse is the case, the owner loading the shipments and taking from

the railroad bills of lading. In less than carload shipments the warehouse company delivers the property to the agent of the railroad company at the station, and the railroad company issues its bill of lading, loads the shipment into the car and moves it out. About 40% of less than carlot business moves out by truck.

The warehouse company sublets parts of the building to tenants who conduct their business there. They are chiefly manufacturing concerns or representatives of manufacturers. The warehouse company has nothing to do with any shipments delivered to them or shipped by them. The railroad treats them the same as any other patrons. The warehouse company also at the warehouse receives from the railroad company freight which has been damaged and refused. At that time the warehouse company takes entire possession of the freight, reconditions it, and sells it at private sale. In case the freight proves to be worth-
134 less, the warehouse company disposes of it. For these services the warehouse company charges the railroad company 10% of the gross proceeds of sale, with deductions for any necessary expenses in reconditioning and handling, and remits the balance to the railroad company. This is after the freight has finished its transportation and is turned over to the warehouse company for disposal by the railroad company in a separate and independent transaction.

Employees of the warehouse company are on the payroll of that company only, and are paid solely out of its funds. They are hired by the warehouse company and discharged by it. They are under no continuing or other authority from the railroad company to supervise and direct the manner of rendition of their services, and never have been. They come under the direction of the Superintendent of the warehouse company, who has full and unrestricted authority to conduct a commercial warehouse buisness in accordance with the charter of the company. These employees are not accorded free transportation by the railroad; they are not entitled to become members of The Pennsylvania Railroad Voluntary Relief Department, or of The Pennsylvania Railroad Employes Provident and Loan Association. Membership in the Relief Department is limited to employees or former employees of the railroad company; that in the Provident and Loan Association to

employees. They have never been regarded by the railroad company as its employees, nor by the warehouse company as other than employees of that company. The warehouse company has paid and is paying taxes under the Federal Social Security Act, Titles VIII and IX, and also makes contributions under the State Unemployment Compensation Law. And it collects from the wages of its employees the tax imposed by Title VIII of the Federal Social Security Act.

All freight delivered by the railroad company to the warehouse company or received by the railroad company from the warehouse company is carried at tariff rates which are subject to the Consolidated Freight Classification. A. H. Greenly's I.C.C.—O.C. 57, Section 1 of Rule 23 of that classification is this:

> "Carriers' agents must not act as agents of shippers or consignees for the assembling or distribution of C. L. or L. C. L. freight."

Section 1 of Rule 14 of the same classification is this:

135 "Carload ratings or rates apply only when a carload of freight is shipped from one station, in or on one car, except as provided in Rule 24, in one calendar day from midnight to midnight, by one shipper for delivery to one consignee at one destination. Only one bill of lading from one loading point and one freight bill shall be issued for such C. L. shipment. The minimum C. L. weight provided is the lowest weight on which the C. L. rating or rate will apply." No exception applies to the freight under consideration here.

The warehouse company files no tariffs with the Interstate Commerce Commission or any state commission. Nor is it a party to any tariff of any railroad company or other common carrier.

During a limited period in 1937-8 the warehouse company conducted a warehouse at Erie, Pa., and stored newsprint paper in carloads. The paper was handled in the same way as sugar is handled at East Liberty. The paper was consigned to the warehouse company at Erie, and delivery by the railroad was made on siding. It was shipped outbound to Pittsburgh in the same way. The owner unloaded inbound and loaded outbound. The railroad company had nothing to do with the paper after delivery inbound and before delivery outbound. Those were matters of the owner.

and the warehouse company. There is no warehouse business conducted now and has not been since the 1937-8 period.

In the valuation of properties of The Pennsylvania Railroad Company by the Interstate Commerce Commission—22 Valuation Reports—these warehouses are not classified as carrier properties.

ARGUMENT

The General Counsel of the Retirement Board in his opinion asserts that the services performed by the warehouse company are those in connection with the receipt, delivery, transfer in transit, storage or handling of property transported by railroad. This is the ground for his conclusion. In the opinion he refers to other opinions of his in *The Long Dock Company case* and the *Baltimore Fidelity Warehouse Company case*. In The Long Dock Company opinion it is stated that the elevator is owned by the Erie Railroad Company, and it can be gathered from the wording of that opinion that delivery of the grain to the consignee is made by the elevator for the Erie. 136 The Duquesne performs no such service for the Pennsylvania. The goods are consigned to the warehouse company, and the railroad itself makes delivery to the warehouse on its siding. In the *Baltimore Fidelity Company* opinion it is stated that at three stations in Baltimore the warehouse company acts as freight agent for the railroad company; and also that employees of the warehouse company solicit freight for the railroad company. Further, it is stated that they receive free transportation from the railway company for private use, and are subject to the medical rules prescribed by the Surgical Department of that company. Not one of these facts is applicable to the Duquesne. The opposite is true.

The letter of the General Counsel divides in two ways. The first is with respect to the storage of sugar at East Liberty, and the second, the general warehouse business at Pittsburgh proper. We answer each.

The facts are more completely set out in the statement of facts at the beginning of this memorandum. Shortly, it may be stated that at the East Liberty warehouse sugar only is handled in carlots. It is shipped by rail from New

York, Philadelphia or Baltimore. The owner and shipper is a sugar company whose name has been deleted from Exhibits F and G. The sugar is consigned to the owner care of the Duquesne. The warehouse is thus the consignee. *Merchants' Warehouse Co.* v. *United States*, 283 U.S. 501. This is true also under the Federal Bills of Lading Act where consignee is defined as "the person named in the bill as the person to whom delivery of the goods is to be made." And delivery to the care of party is a sufficient delivery by the carrier. *City National Bank of El Paso, Texas* v. *El Paso & N. E. R. Co., et al.*, 262 U.S. 695; *Philadelphia Tapestry Mills* v. *New England S. S. Co.*, 146 N.E. 777 (Supreme Judicial Court of Massachusetts).

On arrival at East Liberty the car is placed upon the warehouse company's siding, and delivery is then and there made by the railroad. The sugar is carried by the railroad at carload rates. Under Rule 27 of the governing classification set out in the statement of facts, the consignee loads and unloads. There is no exception in the tariff of the carrier. While the sugar is in the warehouse it is in the sole custody and possession of the warehouse. The warehouse company makes its own charges for any services accorded the property, such as loading, unloading, segregating, assembling or other handling. Those charges are paid to the warehouse company direct by the owner, and all directions as to those services come to the warehouse company from the owner. When the sugar is shipped out the empty car is placed on the siding by the railroad,
137 the owner loads as required by the same classification rule, and receives a bill of lading issued by the agent of the railroad. The property in and out is handled in the same way as any such shipments are handled with any other commercial warehouse, or any consignee or shipper where private siding receipt or delivery in carlots may be had.

While the sugar is being transported by the railroad it is entitled to a transit privilege. The movement may be broken at East Liberty, but the rate finally paid is that from shipping point to ultimate destination and not the combination of the locals. If the sugar does not move out, it pays the local rate into East Liberty and that ends the matter. But the transit privilege is not limited to one shipper or consignee. It is restricted to commodity and

locality. Any shipper or receiver of the commodity and at the locality may use the privilege. Nor is the privilege confined to sugar at East Liberty. A like privilege is available at other points on the lines of the railroad as more fully appears in the statement of facts. The fact is the transit privilege is only a rate matter.* While the goods are in the warehouse they are not in the custody of the railroad, and the tariff so expressly provides. And while they are in such storage there can be no service accorded them by the railroad.

"* * * By Rule 23 of the Consolidated Freight Classification, the carriers may not distribute carloads of freight in less than carload lots, nor assemble smaller lots into carloads. By Rule 14, the carriers confine their service with respect to carload shipments to one consignor and one consignee. The service rendered by appellants' warehouses in distributing and assembling package carload freight is thus one which a carrier is not authorized or permitted to render, even at its own public freight stations, and, if performed by it, would nullify its published rates for carload transportation service. See *New York, New Haven & H. R. R.* v. *Interstate Commerce Commission*, 200 U.S. 361, 26 S. Ct. 272, 50 L. Ed. 515."

Merchants' Warehouse Co. v. *United States, supra.*

The services performed by the warehouse company at Pittsburgh proper are the same as those at East Liberty except that the commodities are other than sugar, and both carload and less are handled. But as to carload freight inbound, it is consigned in the way that the sugar is consigned at East Liberty, and delivered by the railroad to the warehouse in the same way. As to outbound carload shipments, they are made by the warehouse company for the owner just as they are made at East Liberty. In 138 the case of less than carload inbound freight, delivery is made by the railroad to the consignee, the warehouse, at the freight station of the railroad, and on outbound freight the handling is the reverse. The warehouse gives the freight no handling until received by it from the railroad inbound or after delivered by it outbound to the railroad.

* *Central R. R. Co. of N. J.* v. *United States*, 257 U. S. 247.

I.

IT IS NOT AN OBLIGATION OF THE RAILROAD COMPANY TO FURNISH GENERAL STORAGE, EITHER ON ITS LINES OR OFF ITS LINES.

True, storage is a service included in the term "transportation" under the definition in the Interstate Commerce Act. But that means storage only incidental to transportation, as for instance, where goods are received and forwarding is withheld pending shipping instructions. Again, where goods reach destination, the consignee is notified, the period of free time expires, and the goods are not removed. Cases covering matters of this kind are the *Dettlebach case*, 239 U.S. 588, and the *Prescott case*, 240 U.S. 632. But it is not a part of the duty of the carrier to furnish general storage for the care of goods which have been transported by railroad.

"The efficient use of freight cars is an essential of an adequate transportation system. To secure it, broad powers are conferred upon the Commission. Compare *United States* v. *New River Co.*, 265 U.S. 533, 44 S. Ct. 610, 68 L. Ed. 1165; *Avent* v. *United States*, 266 U.S. 127, 45 S. Ct. 34, 69 L. Ed. 202; *United States* v. *P. Koenig Coal Co.* (No. 216, April 12, 1926), 270 U.S. 512, 46 S. Ct. 392, 70 L. Ed. 709. One cause of undue detention is lack of promptness in loading at the point of origin, or in unloading at the point of destination. Another cause is diversion of the car from its primary use as an instrument of transportation by employing it as a place of storage, either at destination or at reconsignment points, for a long period while seeking a market for the goods stored therein. To permit a shipper so to use freight cars is obviously beyond the orginary duties of a carrier. The right to assess charges for undue detention existed at common law. Now, they are subject, like other freight charges, to regulation by the Commission. Demurrage charges are thus published as a part of the tariffs filed pursuant to the statutes."

Turner, Dennis & Lowry Lbr. Co. v. *Chicago, M. & St. P. Ry. Co.*, 271 U.S. 259, 262 (1926).

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II.

THE SERVICES PERFORMED BY THE WAREHOUSE COMPANY ARE THOSE OF COMMERCIAL STORAGE ONLY, AND ARE NOT EMBRACED WITHIN THE MEANING OF THE TERM "EMPLOYER" IN THE RETIREMENT ACT.

In its annual report for the fiscal year ending June 30, 1938, the Retirement Board makes the flat statement that commercial storage and warehouse business is not employer service under the Act. This is from page 142 of that report:

> "Storage of property received for a carrier and awaiting transportation by the carrier, or awaiting delivery by the carrier following transportation, is an employer service; but performance of the usual commercial storage and warehouse business is not. Likewise, the operation of a grain elevator for the receipt of grain for transportation by railroad or for delivery of grain transported by railroad or for transfer of grain from one railroad to another for continued transportation is a service of the type covered; but doing the business of a general commercial elevator is not the performance of an employer service."

But nevertheless, the fact that the business of the warehouse company is that of commercial storage only, and also the clear denial of the Board just mentioned, the General Counsel of the Retirement Board concludes that the warehouse company is an employer within the meaning of Section 1 (a) of the Act, and grounds his conclusion on the statement that the services performed are those in connection with the receipt, delivery, storage or handling of property transported by railroad. With this conclusion we are not in accord. It is the position of the warehouse company that the services enumerated by the General Counsel are those which the railroad company itself is obligated to perform in the transportation of property by it, the railroad, and not those performed by another company after the property has left the possession of the railroad company. It would not be contended, we take it, that the services which the warehouse perform come within the meaning

of the term "employer" of the Retirement Act if the stock of the railroad company were not owned by the railroad company. But does ownership of the stock cast the services of the warehouse company into the category of railroad transportation even though physically they are entirely separate? Certainly not, because under the wording of the statute ownership is not enough. In addition, the service must be that kind of a service which the railroad company itself is obligated to perform in the transportation of the property.

140 There are three ways to reach the correct interpretation of the statutory definition now at issue. The first is from the legislative history of the Act. The second is the application by the Interstate Commerce Commission of similar language in the Commerce Act. And the third is the interpretation which the courts have placed upon that language in the Interstate Commerce Act.

III.

THE RETIREMENT ACT MUST BE CONSIDERED IN RELATION TO THE INTERSTATE COMMERCE ACT BECAUSE AS TO THE ISSUE IN THIS PROCEEDING THE LANGUAGE IN THE RETIREMENT ACT IS SO CLOSELY COUPLED WITH SIMILAR LANGUAGE IN THE COMMERCE ACT.

The definition under discussion in the Retirement Act is this so far as material:

> "(a) The term 'employer' means any carrier (as defined in subsection (m) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, ..."

It will more clearly appear from what follows that the above language as to services was taken from the Interstate Commerce Act which defines transportation as follows:

"'* * * The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

141 What the Retirement Act does is to define "employer" as any carrier subject to Part I of the Interstate Commerce Act, and couples with that any company directly or indirectly owned or controlled by the carrier and which operates any equipment or performs any transportation service as that term is defined in the Interstate Commerce Act in connection with the transportation of passengers or property by railroad. The words in the definition as to receipt, delivery, elevation, etc. are words used in connection with the property which is being transported by railroad. That, of course, means property which is in the course of rail transportation but which is being handled by another for the railroad. There are instances well known where some of these transportation services are not performed by the carriers themselves. *United States* v. *Fruit Growers' Express Co.*, 279 U.S. 363.

These particular services which are singled out by name are all coupled with the words "transported by railroad". In the Interstate Commerce Act, Sec. 1 (3), the term "railroad" is defined, and is this:

"'* * * The term 'railroad' as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. * * *"

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Nowhere in this definition are warehouses specifically mentioned. True, they are covered in the term "terminal facilities" where those terminal facilities are used as part of the railroad transportation. And those words "terminal facilities" are qualified by these: "of every kind used or necessary in the transportation of the persons or property designated herein." The definition throughout is limited to the property while the same is being transported by railroad. When the property is out of the possession of the carrier, in storage or otherwise, it is not in the course of railroad transportation. It may get back into railroad transportation, or it may not, but it is not there at the time. And it is significant to note that as a fact the charges of these outside warehouse companies are never filed with the Interstate Commerce Commission, and that Commission has never attempted to assume jurisdiction over the charges or practices of commercial warehouses. In fact, it has expressly disclaimed such jurisdiction, as will more fully appear in the following part of this memorandum.

142 The situation is this. Both the Interstate Commerce Act and the Railroad Retirement Act are based on transportation by railroad. The first covers persons and property, and the second persons. But they both relate to the same transportation. We have in the Commerce Act, Sec. 1 (3), a definition of the term "railroad": Under that definition the term includes bridges, carfloats, depots, yards, grounds, terminals, etc., but all used or necessary in the transportation of persons or property. In the same paragraph there is a definition of the term "transportation", and under that definition are included locomotives, cars, etc., and further, a specification of detailed services which go to make up this transportation. They are specifically enumerated: receipt, delivery, elevation, transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

In the Railroad Retirement Act an employer is defined as a carrier which is subject to Part I of the Interstate Commerce Act. That definition as to "carrier" takes with it the definition of the term "transportation" as found in the Commerce Act. So in framing the Retirement Act it was not necessary to enumerate the several transportation services, such as elevation, refrigeration or storage. But the framers of the Act did have knowledge, because it is com-

mon knowledge, of the fact that certain common carrier services are not performed by the railroads themselves. Such services, it is also well known, are accorded the property in the transportation by railroad. It was these railroad owned or controlled companies furnishing part of the railroad transportation which it was the obvious intention of the framers of the Retirement Act to include within the terms of that Act. In phrasing the language to include such companies, they are described as performing any service, with certain exceptions, in connection with the transportation of passengers or property by railroad. In the Retirement Act there is no definition in explicit terms as in the Commerce Act of the term "transportation". But the services enumerated are those found in the definition of the term "transportation" in the Commerce Act and are limited by the qualifying words "transported by railroad". How they got there next follows.

143 IV.

THE LEGISLATIVE HISTORY OF THE RETIREMENT ACT MAKES IT UNMISTAKABLY CLEAR THAT THE COMPANIES, ASIDE FROM THE CARRIERS, INTENDED TO BE COVERED IN THE ACT ARE THOSE WHICH OPERATE AS AN INTEGRAL PART OF RAILROAD TRANSPORTATION; AND THAT THE SERVICES ENUMERATED IN THE RETIREMENT ACT ARE THOSE WHICH THE CARRIERS THEMSELVES ARE OBLIGATED TO PERFORM.

A limited number of extracts from testimony at the hearings before the Congressional Committees makes the matter under discussion so clear that the question is forced to the front why the Retirement Board has felt justified in attempting to extend the coverage of the Act in this and other directions. We go to the Railway Labor Act first, and the hearings on Senate bill 3266, April 10, et seq., 1934. The bill was to amend the Railway Labor Act of May 20, 1926. The language of the bill defining the term "carrier" was this:

> "The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to

the Interstate Commerce Act, any company operating any equipment or facilities or furnishing any service included within the definition of the terms 'railroad' and 'transportation' as defined in the Interstate Commerce Act, * * *."

Clearly the services intended were those now found in the definitions of "railroad" and "transportation" in the Commerce Act. Mr. Eastman, then Federal coordinator of Transportation, had drafted the bill and was sponsoring it. At the hearing before the Senate Committee on Interstate Commerce, the chairman of the committee, Senator Dill, objected to the incorporating language, when he said, "If you define the terms of one act by another act, everybody has to dig it up." (p. 11) Mr. Eastman's testimony was this:

"In the paragraph of section 1 marked 'First', there is a change in the present definition of the term 'carrier.' This change is intended to bring within the scope of the act operations which form an integral part of railroad transportation, but which are performed by companies which are not now subject to the Railway Labor Act. The most important illustration is found in the refrigerator-car companies, which own refrigerator cars operated by the railroads and perform certain functions connected with refrigeration service. Another illustration is found in the companies to which railroads have on occasion contracted out their maintenance work on equipment and even on way and structures. *The thought is that concerns which function in this way as an integral part of the railroad transportation system should be subject to the same duties and obligations with respect to labor controversies as the railroads themselves and as the express and sleeping-car companies.* This object is attained by including in the definition of 'carrier' any company 'operating any equipment or facilities or furnishing any service included within the definition of the terms "railroad" and "transportation" as defined in the Interstate Commerce Act.' Perhaps a better way can be found of accomplishing the desired result, but it was thought that this language would serve the purpose.

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"I may say that in reading that over last night I am not sure the language does cover all companies to which railroads on occasion have contracted out their maintenance work, and it perhaps should be examined rather carefully from that point of view.

"The Chairman. I am impressed with the fact that instead of defining the terms in this bill you have defined them as defined in some other bill.

"Mr. Eastman. Yes.

"The Chairman. That is rather poor legislation, isn't it, generally?

"Mr. Eastman. Well, the definitions in the Interstate Commerce Act are, of course, definitions of long standing.

"The Chairman. I am not objecting to it; I am wondering if they should not be written into this bill.

"Mr. Eastman. That might, perhaps, be better. Some paraphrasing would have to be done if that were done in that way.

"The Chairman. The very fact it would have to be done is a reason that it should be done. If you define the terms of one act by another act, everybody has to dig it up.

"Mr. Eastman. I am not sure the language as it stands does cover all that it is intended to cover. I shall be glad to give it further consideration, and to indicate later any changes which I think ought to be made." (Italics supplied.) (pp. 10-11)

145 And again testifying on the same bill on a later date—April 19, 1934—Mr. Eastman said this:

"Mr. Eastman. I shall discuss, first, the amendments to S. 3266 which have been proposed by the railroads.

"Section 1, paragraph first: The railroads wish to strike out the words 'any company' in line 10 of page 1. This amendment would confine the bill to the employees of express companies, sleeping-car companies, and railroads. It would eliminate companies, like refrigerator-car companies, which operate facilities or furnish service forming a part of railroad transportation. Most of the illustrations given by Mr. Clement to support his objections to the words 'any company' relate to construction work. The language in the bill would not

cover outside companies engaged in such work for the railroads, as I read it. He is right in believing that it would cover trucking companies performing terminal service for the railroads. However, he approves of the wording of the present act, and that includes 'other transportation facilities used by or operated in connection with any such carrier by railroads'. It is plainly broad enough to cover terminal trucking.

"The Chairman. As I recall it, he claimed that it would affect their building of bridges and affect their contracts for all kinds of work. Is that your understanding of the definition?

"Mr. Eastman. Well, as I read the definition in the bill, as I have said here, I do not think it would cover such construction work. However, I am about to propose an amendment.

"While I believe that the railroad objections are largely without basis, the chairman has made a valid criticism of the definition of 'carrier' now in the bill, because it requires reference to another act. I can also see difficulties in bringing in trucking operations and certain other operations performed for railroads by outside companies, because of possible conflicts with N.R.A. codes. It is difficult to know just where to draw the line. I am inclined to believe that for the present it would be well not to go beyond carriers and their subsidiaries engaged in transportation. So changed, the definition would read:

146 "The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad.'

"That, I may say, is some of the language in the Interstate Commerce Act.

"The Chairman. Is there some difference, however? Isn't this reference here to parent, subsidiary, and affiliated, new?

"Mr. Eastman. Yes. I am confining this now to the railroad subsidiaries because of the possible conflict with N.R.A. codes if we go into the outside field. Going on with that—.

"'and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such carrier.'" (pp. 145-6) (Italics supplied)

Before the House Committee on Interstate and Foreign Commerce on May 22, 1934, there were two bills, H.R. 7650 and H.R. 9689, which latter in the interval had been favorably reported by the Senate Subcommittee. There the testimony of Mr. Eastman was this:

"Commissioner Eastman. Well, that is the bill that I will talk about this morning. This bill does not depart from the general principles of the present Railway Labor Act, but instead is designed to reinforce those principles and provide for their more effective application. It seeks not to overturn but to perfect what has been done.

"I call attention in the first place to the fact that section 1 contains definitions. The present Railway Labor Act contains a definition at the outset of the term 'carrier', which has been subject to some doubt. I do not think it has ever been fully decided just what is covered by the definition of 'carrier' in the act as
147 it now stands. In this bill, H.R. 9689, the definition provides that the term 'carrier' shall include any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act; and then goes further and includes

'any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier".'

"*Now, summing that up, it includes with those car-*

riers subject to the provisions of the Interstate Commerce Act, i. e., all railroad companies and express companies and sleeping-car companies, and all companies which are directly or indirectly owned or controlled by the railroads and which perform service or furnish facilities in connection with transportation service performed by the railroads, and the definition includes words descriptive of such transportation service which are taken from the provisions of the Interstate Commerce Act.

"Now I should mention an amendment which has been suggested at that point: In line 4 on page 2, it has been suggested that after the word 'transportation' there should be inserted the words 'of passengers or property by railroads' and then go on with the words 'receipt, delivery, elevation,' and so forth.

"I see no objection to that amendment. The language as drawn refers to transportation of property, and this amendment is intended to make it clear that transportation of passengers is also to be included." (Italics supplied.) (pp. 16-17)

This testimony shows clearly (1) that the companies intended to be included, other than carriers subject to the Interstate Commerce Act, were those which function as an integral part of the railroad transportation system; (2) that the services enumerated were those embraced in the term "transportation" as defined in the Commerce Act, and were intended to be so limited; and (3) that the intentions were those of an Interstate Commerce Commissioner charged with the duty of enforcing the Commerce Act.

148 And the words in the amended Railway Labor Act, as then passed and as we now have them, "receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property by railroad," are almost precisely the words appearing in the definition of "transportation" in the Commerce Act. The complete definition in the Railway Labor Act so far as here material is this:

"The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and

which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, * * *."

While the foregoing shows the services enumerated in the Labor Act as being taken from the Commerce Act, the next step is to the Retirement Act. That Act as is known was not drafted in the conventional way by committees of Congress. It was framed by the agreeing parties, and was sponsored before the committees of Congress by Mr. Harrison who represented the labor interests but spoke also for the carriers, since the parties were in agreement. He said in testifying before the House Committee on H.R. 6956, the Retirement Act in then bill form, this:

"Now section 1 might be referred to as the scope of the legislation. Section 1 makes the bill applicable to those that are defined in that section as employers. Now the employers defined in section 1 are express companies, sleeping-car company, or carrier by railroad that are subject to part 1 of the Interstate Commerce Act, and in addition thereto it is proposed to include as employers any company which may be directly or indirectly owned or controlled by the express company, the sleeping-car company, or railway company, or under common control by one or more of such companies, when those companies are engaged in the business of transporting passengers or property for the railroad, or other service that is a part of railway transportation, such as grain elevators, private car lines, refrigerator car companies, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of these previously identified employers which are, express companies, sleeping-car companies, or carriers by railroad." (p. 17)

149 And on the same Act before the Senate in bill form—S. 2395—his testimony was this:

"Mr. Harrison. In offering these amendments, I should like to say that the amendments have been agreed to by the railway management, by railway labor, and by the Treasury of the United States. We have inserted the amendments in the proper places,

and we have enough corrected copies of the bill to distribute to five or six of the members of the committee.

"The first of these amendments is as follows: On page 2, paragraph (a), strike out lines, 3, 4, 5, 6, 7, and 8, and also strike out the words 'trucking service' on line 9; and in lieu thereof, substitute the following [reading]:

> '(a) The term "employer" means any carrier (as defined in subsection (m) of this section) and any company which may be directly or indirectly owned or controlled by one or more of such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities).'

"The Chairman. What is the meaning of 'casual'?

"Mr. Harrison. Well, the railways occasionally employ a contractor to repair a depot or to build a bridge, or do some other work for them that ordinarily is carried on by the railway force. In that instance, we would not undertake to take in the force of the contractor, just because those men were doing occasional work for the railroad company.

"Senator White. These are services that are not ordinarily performed by the railroad company or by its employees?

"Mr. Harrison. That is true.

"The Chairman. Does this include busses operated by the railroads?

"Mr. Harrison. No. If the bus is operated by the railroad as a part of its transportation, then the workers on the bus would come under the proposed law. However, if there is a subsidiary bus or truck company, then it is subject to part II of the Interstate Commerce Act; and this bill applies only to part I of the Interstate Commerce Act—'such common carriers as are subject to part I of the Interstate Commerce Act.' And they are—

> 'any express company, sleeping car company, or carrier by railroad, subject to part I of the Interstate Commerce Act, and any company which may be directly or indirectly owned or controlled there-

by or under common control therewith, and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad.'

"*In other words, part of the railroad plant.*

"Senator Davis. What trucking service do you except?

"Mr. Harrison. Well, you see the railroads recently have inaugurated store-door pick-up and delivery merchandise service, for merchandise freight. And that store-door pick-up and delivery service for merchandise freight is at the present time quite generally handled under contract by an outside trucking company.

"Senator Smith. And not by the regular employees of the railroad?

"Mr. Harrison. No. So therefore it only excludes a company that might be engaged in the transportation of property for the railroad, if that company is engaged in the business of trucking the freight; that means motor trucks.

"Senator Minton. Does it take in a company like the Greyhound Co.?

"Mr. Harrison. No; that comes under title II of the Interstate Commerce Act.

"The Chairman. But it says [reading]:

151 '(a) The term "employer" means any express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act, and any company which may be directly or indirectly owned or controlled thereby or under common control therewith.'

"Mr. Harrison. Yes; but that is qualified later on, Senator.

"The Chairman. I see; I was wondering if there was a qualification. I did not see any in that paragraph.

"Senator Minton. It says 'trucking service.'

"Mr. Harrison. Well, this is the statement [reading]:

'(a) The term "employer" means any express company, sleeping-car company, or carrier by rail-

road, subject to part I of the Interstate Commerce Act, and any company which may be directly or indirectly owned or controlled thereby or under common control therewith, and which operates any equipment or facilities or performs any service (other than trucking service)—'

"And then here is the qualification [reading]:

'in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad.'

"Senator Johnson. I cannot find his subsection '(m)'; it goes only to (j).

"Mr. Harrison. It has been inserted, Senator; that is on page 6.

"Senator Brown. How about bus transportation? What provision is there for a bus line operated by a railroad, intrastate?

152 "Mr. Harrison. If the bus transportation is operated directly by the railroad company, as part of the railway's operation, then the employee engaged in the operation of the bus would be covered, as a railroad employee. We have such a situation in a few instances where the railroad companies have abandoned branch operations and have substituted motorbusses. But that motorbus is operated by the railroad. You buy your railroad ticket, and ride on the bus to the main line of the railroad, and then complete your trip in a railroad car on the main line of the railroad. On the other hand, if the bus is operated as a subsidiary operation, then that is excluded and comes under part II of the Interstate Commerce Act.

"Senator Brown. The Boston & Maine, in New Hampshire, has a bus company. The passengers on those busses get railroad tickets, and the busses are coordinated with the railroad line.

"Mr. Harrison. Well, they have an arrangement for supplemental service, but it is not part of the railroad operation.

"Senator Brown. They have formed a subsidiary corporation, and operate under that?

"Mr. Harrison. Yes.

"Senator Brown. Do you think the employees of that bus line would come under the provisions of this bill?

"Mr. Harrison. No; those employees would not. You see, when you get into the field of bus transportation, you have not only the subsidiary corporations of the railroads, but you have many privately owned bus companies. And in this instance we have proceeded with the thought that we had better not try to invade the motor-transportation field, but that we had better restrict ourselves to the railroad industry.

"Senator Johnson. The bus-transportation industry is only in its infancy, anyway; in the next few years it will probably call for an amendment of that kind.

"Mr. Harrison. Oh, in our experience we shall probably call for amendments, and the railroads probably will.

"Senator Johnson. And as the railroads get buses." (pp. 11-13) (Italics supplied.)

153 In the companion taxing act the definition of the term "employer" is exactly the same as that found in the Retirement Act except for reference to the enumerated subsection of the Interstate Commerce Act. In testifying before the House Committee on that Act, Mr. Harrison said this:

"Mr. Treadway. Then may I ask what is a fair illustration—I did not hear all of the interchange between you and Mr. McCormack—of where the language 'indirect' would come in?

"Mr. Harrison. For instance, they have elevator companies that handle the storage of grain. They may be indirectly owned or controlled by a railway company. It is a railway facility. But it is operated through a subsidiary organization. If they did not have the subsidiary organization, it probably would have its own grain elevator.

"This act covers those men. They may have a refrigerator car company. They may have a subsidiary organization handling some of their mechanical work; some of their accounting and collecting.

"For instance, in Chicago, Ill., they have a joint collecting agency. The railroads got together and organized a joint collecting agency. If that were incor-

porated and the stock were owned by a number of roads, that would come under the provision.

"The provision that is here under discussion, 'directly or indirectly owned or controlled' is a standard provision which Congress included in the Railway Labor Act and we are trying to include in this tax act the same coverage that is in the Railway Labor Act.

"Mr. Thompson. Would that cover the ferries in New York and 'Frisco harbors?

"Mr. Harrison. Yes; it would cover the ferries in New York and 'Frisco harbors, if they were directly or indirectly owned or controlled by railroad companies and if those ferries were engaged in the transportation of passengers or property in interstate commerce for the railway companies." (Italics supplied.) (H.R. 6448, p. 9).

154 The testimony of Mr. Harrison in the hearings on the Carriers' Taxing Act, 1937, shows in so many exact words that the coverage in that Act was intended to be the same coverage which is in the Railway Labor Act. The Taxing Act is an inseparable part of the Retirement Act. *Alton R. Co.* v. *Railroad Retirement Board*, 16 F. Supp. 955. And we have shown from the foregoing testimony that the coverage in the Railway Labor Act, in addition to the carriers themselves, was intended to be those companies owned or controlled by the carriers and which perform a service which is an integral part of railroad transportation, and further, that the services enumerated in the definition of "employer" in the Retirement Act are taken from the Interstate Commerce Act and are those which a carrier is obligated to perform in transportation by railroad, i. e., while the property is being transported by railroad. The coupling is complete.

V.

IN THE APPLICATION OF THE WORD "STORAGE" AS A PART OF THE DEFINITION OF THE TERM "TRANSPORTATION", THE INTERSTATE COMMERCE COMMISSION HAS REPEATEDLY HELD IT TO BE RESTRICTED TO THAT STORAGE WHICH IS INCIDENTAL ONLY TO TRANSPORTATION.

The first case is *Guaranty Claim of Central Elevator & Warehouse Co.*, 72 I.C.C. 169 (1922). That case arose under the guarantee provisions of the Transportation Act 1920. It was an application by the Illinois Central, and the question was whether the operations of the warehouse company could properly be considered as railway operations. There, as here, the railroad company wholly owned the Elevator and Warehouse Company; and there, as here, the Elevator and Warehouse Company was a public facility. But the Commission declined to hold that the storage in the elevator was storage under the definition of "transportation" in the Interstate Commerce Act. It said this:

> "The transportation act contains no general definition of 'railroad' or of 'transportation'. The railroad and warehouse companies point out, however, that both of these terms are defined in section 1 of the interstate commerce act. In that section the term 'railroad' is said to include, *inter alia*, 'all * * * terminals and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds used or necessary in the transportation or delivery of any such property,' and the term 'transportation' to
155 include 'locomotives, cars and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.' These definitions, placed together in the same section, are

interdependent one upon the other; without the definition of 'transportation' the definition of 'railroad' is incomplete. No definition of the term 'system of transportation' appears in either the transportation act or interstate commerce act, and the definition of 'transportation' in the interstate commerce act is of doubtful value as an aid in determining the meaning of 'system of transportation' as used in section 209 of the transportation act, 1920. It is quite obvious, however, that while certain of the services performed by the Central Elevator & Warehouse Company are incidental to transportation services, other of such services can not be so considered in any proper sense. The receipt and delivery of property are, of course, a part of a carrier's transportation service. Elevation and transfer in transit have frequenty been found by us and by the courts to constitute necessary steps in the transportation of various kinds of property. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U.S. 42; *Union Pacific Railroad Company* v. *Updike Grain Company*, 222 U.S. 215.

"Storage of property transported is a transportation service only to the extent that storage is necessarily incidental to transporting such property, and the term has been used in section 1 in that limited sense. As was said by the court in *State* v. *Southern Pacific Company*, *supra*:

> 'We think that the storage of goods by a railroad in its warehouses, as a matter incidental to its business as such, contemplates and looks to a rotation of storage as immediate and prompt as the railroad corporation can make it. * * * To be incidental business, the storage must be preliminary either to immediate transportation or immediate removal.'

"The revenues of the warehouse company are derived on the one hand from elevation of grain and certain other services which properly pertain to transportation, and, on the other, from storage of grain
156 for hire for indefinite periods and other services which are not transportation services, and are not actually incidental thereto. But it seems beyond question that the activities of this company which give it character

and definitely establish its status are its storage or public-warehouse operations. Admittedly the reason for its incorporation was to enable it to store grain and issue storage receipts therefor. These things the railroad company could not lawfully do under the laws of Louisiana. Having been created for these particular purposes, the railroad company and its subsidiaries also turned over to it by lease agreements the services incidental to transportation, such as elevation and transfer in transit, which these carriers might have retained unto themselves. The fact that the railroad company guarantees payment of all expenses and obligations of every kind of the warehouse company and recaptures its excess earnings, if any, does not alter the outstanding fact that the railroad companies could not themselves lawfully carry on the storage or public-warehouse business that the warehouse company is doing."

And recently in its motor carrier decisions the Commission has held to the same effect.

"Some analogies may be helpful. By virtue of section 1 (3) of part I, services by rail carriers in connection with the storage of property transported are included within the term 'transportation', and thus 'come within the jurisdiction of the Commission.' Separate charges therefor must be shown in the tariffs of the carriers. The Commission has frequently decided controversies involving the reasonableness of such charges and discriminations and the like growing out of the rendering of the services. But the warehousing companies who perform the service are not carriers subject to part I (*Guaranty Claim of Central Elevator and Warehouse Co.*, 72 I.C.C. 169) even though wholly owned subsidiaries of a rail carrier. It would not be reasonable to assert that in the event the United States Warehouse Act (39 Stat. 486) regulating the operation of warehouses, had contained a provision subjecting such operations to the jurisdiction of the Secretary of Agriculture 'except to the extent that they are subject to the Interstate Commerce Act', all warehouses which furnished any service to rail carriers could escape the jurisdiction of the Warehouse Act merely

because of the fact that what they did for rail carriers was reflected in rail tariffs and passed on to the shipper as rail charges. Such a conclusion is not ten-
157 able, yet the situation seems on all fours with the one herein discussed. The same thing might apply as well to elevator service, icing service, wharfage, docking, and others."

Scott Bros., Inc., Collection and Delivery Service, 2 I.C.C. Motor Carrier Cases 155, 159 (1937).

And the construction placed upon a statute by the body charged with its enforcement, and which has long obtained in practical application, will generally be accepted by the courts. *Logan* v. *Davis*, 233 U.S. 613, 627; 63 F. 2d 472, 476; 54 F. 2d 122, 126.

VI.

THE CONSTRUCTION PLACED BY THE COURTS UPON LANGUAGE IN THE INTERSTATE COMMERCE ACT SIMILAR TO THE DEFINITION "EMPLOYER" IN THE RETIREMENT ACT IS CONTRARY TO THE CONSTRUCTION PLACED UPON THAT DEFINITION BY THE GENERAL COUNSEL OF THE RETIREMENT BOARD.

Section 15 (13) of the Interstate Commerce Act is that part of that statute which deals with allowances to the owner of property who "renders any service connected with such transportation". These particular words "connected with such transportation" have been construed by the courts. In *New York Central & H. R. R. Co.* v. *General Electric Co.*, 146 N. Y. Supp. 322, these words were under consideration by the trial court. That court said this:

"* * * I understand that the defendant urges that the wording of section 15, '*If the owner of property transported under this act directly or indirectly renders any service connected with such transportation or furnishes any instrumentality used therein*,' etc., includes this service in question; that the service for which the owner may receive compensation from the carrier under this provision need not be a part of the

transportation itself, but only connected with it. *I conclude, however, that the expression 'connected with' is a synonym of 'a part of'; it does not mean something, in addition to transportation, that touches, or is attached to, transportation.* A common carrier of property cannot include in its charge for transportation an item which is not a part of transportation, and it was not intended by said provision to require the carrier to pay for a service which it was not bound as a carrier of property to render and for which it could not charge. * * *" (Italics supplied.)

158 . That case was affirmed by the Court of Appeals where reference is made in its opinion to the "careful opinion of the court below". 219 N. Y. 227. Certiorari was denied, 243 U. S. 636.

Next is the case of *American Sugar Refining Co.* v. *D. L. & W. Ry. Co.*, 200 Fed. 652. There the court said this:

"The plaintiff's insistence is that such allowance is for a service in connection with the transportation of sugars, and is authorized by section 15 of such act, as amended by Act June 18, 1910, c. 309, sec. 12, 36 Stat. 551 (U. S. Comp. St. Supp. 1911, p. 1300). The pertinent part of such section is as follows:

> 'If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order; which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.'

"It will be noted that this section recognizes the right of the owner of property transported to receive a just and reasonable allowance, when he directly or indirectly renders any service connected with such transportation. The term 'transportation,' as defined

by section 1 of such act, includes 'all instrumentalities and facilities of shipment or carriage, * * * all services in connection with the receipt, * * * transfer in transit * * * and handling of property transported.' After so defining 'transportation,' said section provides:

> 'It shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor.'

"In a sense the sugars, in being drayed from the refinery to the railroad, were transported; but such transportation is not within the comprehension of such term as here legislatively defined. The draying service
159 here rendered is normally one that falls upon the shipper, and not the carrier, and could not be exacted from the latter. It will be observed that, while all the services included within this legislative definition of transportation normally fall upon the carrier, as a fact they could be rendered by the shipper; but it is clear that, as the act casts upon the carrier the duty to perform, upon request, what it defines as transportation, any services which could not be exacted from the carrier would not come within the meaning of 'transportation' thus defined, even though rendered by the shipper.

"The plaintiff does not contend that transportation begins at the factory, but insists that, while such draying may not be transportation, it is a 'service connected with' transportation, within the meaning of section 15; but the phrase 'service connected with' such transportation, as used in such section, can be given no more comprehensive meaning than the similar phrase 'service in connection with' the receipt of property to be transported, contained in section 1. The argument that at common law a common carrier, in the promotion of its business, could contract to dray the goods from the factory to its railroad is not helpful in this discussion. Many of the common-law rights of carriers have been taken away; and in the matter of making allowances for services rendered in connection with transportation it is perfectly manifest that the only services of the shipper that can be compen-

sated for by the carrier, under the statute, are such as are rendered by the shipper after the carrier's duty to take and transport the goods has begun. Draying of the kind under consideration necessarily precedes both the receipt and the transportation of the sugars by the railroad company. * * *" (pp. 655-6)

This case was reversed in 207 Fed. 743 but on other grounds. However, the particular point mentioned and the language used were approved in *Pennsylvania R. Co.* v. *M. McGirr's Sons Co.*, 287 Fed. 334, certiorari denied 262 U. S. 743, where the court said this:

"* * * Draying sugar from a refinery to the railroad, where it is transported in interstate commerce, does not constitute transportation or service connected with transportation, within section 15 of the Interstate Commerce Act (Comp. St. sec. 8583), but is an accessorial expense of the shipper. * * *" (p. 337)

160 It is a rule of statutory construction that when language found in one statute is enacted as part of a subsequent statute it should there receive the same interpretation. Nor is it essential that the enactment of the second statute should be in identical wording. Substantial sameness is sufficient. *Sessions* v. *Romadka*, 145 U. S. 29:

"* * * We think that section 4917 ought to be read in connection with section 4922, providing that the patentee may maintain a suit at law or in equity for the infringement of any part of the thing patented, notwithstanding the specifications may embrace more than that of which the patentee was the first inventor or discoverer; but in every such case in which a judgment or decree shall be rendered for the plaintiff no costs shall be recovered, unless the proper disclaimer has been entered at the Patent Office before the commencement of the suit. This was practically the construction given to corresponding sections of the act of 1837 by this court in *Smith* v. *Nichols*, 21 Wall. 112; and of the Revised Statutes in *Dunbar* v. *Myers*, 94 U. S. 187, 193. Under section 4922 the effect of delaying a disclaimer until after the commencement of the suit goes only to the recovery of costs. We adhere to that construction. Congress, having in the Revised Statutes adopted the language used in the act of 1837, must be

considered to have adopted also the construction given by this court to this sentence, and made it a part of the enactment." (pp. 41-2)

See also *Kendall* v. *Garneau*, (Neb. 1898), 75 N. W. 852.

FOR THE REASONS ABOVE APPEARING, IT IS CLEARLY DEMONSTRATED THAT THE OPINION OF THE GENERAL COUNSEL OF THE RETIREMENT BOARD IS IN ERROR AND SHOULD NOT BE ADOPTED BY THE RETIREMENT BOARD.

Respectfully submitted,

DUQUESNE WAREHOUSE COMPANY,
By GEORGE R. ALLEN
George R. Allen,
Counsel

14 February 1940

161 APPENDIX

This appendix contains definitions of the terms "railroad" and "transportation" from the Interstate Commerce Act; and also so far as here material definitions of the term "employer" from the Railway Labor Act of 1934, the Railroad Retirement Act of 1937, and the Carriers' Taxing Act of 1937.

INTERSTATE COMMERCE ACT

"* * * The term 'railroad' as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, ex-

press or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."—Sec. 1(3) * * *.

RAILWAY LABOR ACT OF 1934

"The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, * * *."—Sec. 1(First) * * *.

RAILROAD RETIREMENT ACT OF 1937

"The term 'employer' means any carrier (as defined in subsection (m) of this section), and any company 162 which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, * * *."—Sec. 1(a) * * *.

CARRIERS' TAXING ACT OF 1937

"The term 'employer' means any carrier (as defined in subsection (i) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection

with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, * * *"—Sec. 1(a).

163. EXHIBIT D

DUQUESNE WAREHOUSE COMPANY No. 4692

Pittsburgh, Pa.....19...

Received in store at Warehouses, Barbeau Street and Duquesne Way,

From .....

.....

.....

.....

At owners risk of damage from fire, leaking, heating, freezing, sprinkler leakage, or from all other causes not attributable to want of ordinary care on our part. Deliverable only upon the order endorsed hereon of

.....

and the surrender of this certificate and the payment of all charges.

Storage Rates

Charges advanced $..... Section .....

Countersigned .....

.....

Bookkeeper.

DUQUESNE WAREHOUSE COMPANY.

By .....

Superintendent.

164 EXHIBIT E

DUQUESNE WAREHOUSE COMPANY No.....

Memorandum
Not Negotiable
Cancelled Feb 6 1940 Duquesne Warehouse Co.

Pittsburgh, Pa. .....191...

Received in store at Warehouses, Third Street and Duquesne Way,

.....

.....

.....

At owners risk of damage from fire, leaking, heating, freezing, or from all other causes not attributable to want of ordinary care on our part. Deliverable after the payment of all charges to

.....

Storage Rates
Charges advanced $..... Section .....
Countersigned .....

.....

Bookkeeper.

DUQUESNE WAREHOUSE COMPANY.

By .....

Superintendent.

EXHIBIT F

165

COPY

F. D. 2526 2000M 7-18-35 8½ x 7½

[1] Uniform Domestic Straight Bill of Lading, Adopted by Carriers in Official, Southern, Western and Illinois Classification territories, March 15, 1922, as amended August 1, 1930.

(Cut of P. R. R.)

UNIFORM STRAIGHT BILL OF LADING
ORIGINAL—NOT NEGOTIABLE

Shipper's No. C & H A 2797
Agent's No.

THE PENNSYLVANIA RAILROAD COMPANY

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading.

At Long Island City, N. Y., Aug. 9, 1939 From ---------- Company

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to ---------- Company % Duquesne Whse

Destination East Liberty State of Pa. County of

Route PENN RR - FOR STGE IN TRANSIT

Delivering Carrier Car Initial Penn. Car No. 78268

No. Pkgs.	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*Weight (Sub. to Cor.)	Class or Rate	Check Col.
	— SUGAR —			
400	Bags Con "AA" Multiwall	40400		

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not m e delivery of this shipment without pay nt of freight and all other lawful charg

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Prepaid

Received $.....
to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per .....
(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$.....

THE PENNSYLVANIA RAILROAD
B'klyn E. D. Term'l
Aug. 9 — 1939
Boro. Brooklyn, N. Y.
T. P. Smith, Gen. Agt.
Per J. M. Kelly

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding ---------- per ----------

(1)9975c

---------- Company Shipper ---------- Agent

Per ---------- Per ----------

Permanent postoffice address of shipper Wall St., New York City

663974 O - 45 (Face p 170) No. 1

170

Duquesne Warehouse Company v.

EXHIBIT G

COPY

[1] Uniform Domestic Straight Bill of Lading, Adopted by Carriers in Official, Southern, Western and Illinois Classification territories, March 15, 1922, as amended August 1, 1930. F. D. 2526 2000M 7-18-35 6½ x 7½

(Cut of P. R. R.)

UNIFORM STRAIGHT BILL OF LADING
ORIGINAL—NOT NEGOTIABLE

Shipper's No. H74
Agent's No. _____

THE PENNSYLVANIA RAILROAD COMPANY

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading.

At East Liberty Pa 1/31/40 193——From _____ Company

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destintaion, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to _____ Company (Mail or street address of consignee—For purposes of notification only.)

Destination Youngstown State of Ohio County of

Route PRR

Delivering Carrier Car Initial PRR Car No. 50492

No. Pkgs.	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*Weight (Sub. to Cor.)	Class or Rate	Check Col.
75	Bags Sugar 100 # Berry W. C.			
10	Bags " 100 # Golden C Blp P/1			
15	Bags " 100 # Powdered Blp			
40	Bags " 25 # Berry Paper			
40	Bags " 25 # Golden C Blp P/L			
20	Bags " 25 # Powdered Blp			
75	Bales " 4/25 Berry Blp			
75	Bales " 10/10 Berry			
75	Bales " 20/5 Berry			
50	[illegible]			
10	Cart " 25/2 Berry			
75	Cart " 24/1 Powdered	40966 #		

transit record #1284 PENNSYLVANIA SYSTEM

accorded transit privilege at East Liberty, Pa. Received Jan. 31 1940

A. D. CAMLIN

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or

Prepaid

Received $ _____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per _____ (The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$ _____

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding _____ per _____

9975c

_____ Company Shipper _____ Agent

Per Duquesne Warehouse Co. Per _____

Permanent postoffice address of shipper — Wall Str N Y City

EXHIBIT H

167

Fourteenth Revised Page 384
Cancels
Thirteenth Revised Page 384

Section No. 23 — THE PENNSYLVANIA RAILROAD COMPANY

I. C. C. 100 · I. R. C. 10 · Ill. C. C. 15 · M. P. S. C. 10 · Pa. P. U. C. 50 · W. Va. 20 · Ohio 15

RULES GOVERNING TRANSIT PRIVILEGES ON SUGAR, CARLOADS, AT STATIONS SHOWN ON

Rule No.	SUBJECT	EXPLANATION
V-1	**Definition.**	(a) Storage in transit privileges on Sugar will be permitted at station 383 when shipped and handled in conformity with the rules and regulat Tariff 226-B, I. C. C. A-2725, issued by L. E. Kipp, Agent, also rules 5, 3 145 and 150 of this tariff. (b) Transit privilege, as defined in the rules, will also permit the preserve its commercial condition for the prevention of caking, lumping, etc., and in the process of grinding, any loss in weight, but not exceeding five percent (5%) may be replaced by an equal amount of Corn Starch. (c) The rules announced herein will only apply on shipments destined to points beyond the switching district of transit points. Rules announced herein also will not apply on shipments destined to or moving through points in Southern Freight Association territory as defined in Rule 150. ①Applies only at Cleveland, Ohio, Detroit, Mich., East Liberty, Pa., Pittsburgh, Pa., and Toledo, Ohio.
V-2	**Time Limit.**	The period of time allowed for transit privilege will be twelve (12) months from the date of unloading into the transit house. At the expiration of the time limit transit privilege shall absolutely cease and the applicable rates to and from the transit point will apply. **Exception.**—On shipments originating in Central Freight Association Territory, as described in Rule 165, period of time allowed for transit privilege will be eighteen (18) months from the date of unloading into the transit house.
V-3	**Transit Charge.**	Cancel.
V-4	**Transit Rate.**	By transit rate is meant the lawfully published rate through from the original point of shipment or point of importation (as the case may be) to the reforwarded destination beyond the transit point in effect via the transit point and route of movement at the time of initial shipment from point of origin or point of importation (as the case may be) applicable to the sugar covered by inbound billing which does

1	Stations in Trunk Line and New England Territories, as defined in Rule 150; also stations in Carolina and Southeastern Territories, as defined in Rule 150, received from connections at Potomac Transfer.	P. R. R. Pittsburgh, P. R. R.	Pittsburgh, Pa., where the through rates apply via Pittsburgh, Pa., including stations on the P. R. R. from Houston Jct. to New Castle, Pa.; also stations on the P. R. R., between Pittsburgh (exclusive) and Butler, Pa. (inclusive), and stations on connecting lines beyond Butler, Pa.; also stations on the P. R. R. and Monongahela Railway between Pittsburgh, Pa. (exclusive) and Fairmont, W. Va. (inclusive) through McKeesport and Brownsville Jct., Pa., also stations on the P. & L. E. R. R. from East California to Homestead, Pa. (exclusive).
-2	Stations on the P. R. R. and connections west of Pittsburgh, Pa.	P. R. R. Pittsburgh, P. R. R.	Stations on the P. R. R. and connections east of Pittsburgh, Pa., where the through rates apply via Pittsburgh, Pa.
3	Baltimore ..... Md. Philadelphia ..... Pa. New York ..... N. Y.	P. R. R. Pittsburgh, P. R. R.	Stations on the P. R. R. from Kiskiminetas Jct. to Erie, through Oil City and Corry, Pa. Stations on the P. R. R. from Corry, Pa., to Buffalo, N. Y. (Applies from Baltimore, Md., only.)

663924 O - 45 (Face p. 170) No. 3.

168 Re DUQUESNE WAREHOUSE CO.

Facts found by M. R. Reed, Board Member, after personal investigation at Pittsburgh, Pa., and to be incorporated in the record.

The Duquesne Warehouse Company is not subject to Part I of the Interstate Commerce Act, and never has been subject to the Interstate Commerce Act or any part of it. It is not a common carrier under that Act and never has been. It files no tariffs with the Interstate Commerce Commission covering the services which it performs or offers, and has never filed any. Nor has it been requested to do so. Nor does it report, nor has it ever reported its employees to the Interstate Commerce Commission as carriers subject to Part I of the Interstate Commerce Act are required to do by the rules of the Commission governing the classification of railway employees and reports of their service and compensation. Nor does The Pennsylvania Railroad Company in reporting its employees to the Interstate Commerce Commission pursuant to such requirement include the employees of the Warehouse Company; nor has it ever done so. The Warehouse Company has never met any of the requirements of the Railway Labor Act, nor been subject to that Act, that Act being in effect since May 20, 1926—44 Stat. 577. Nor is the Warehouse Company subject to the Hours of Labor Act, September 3, 5, 1916—39 Stat. 721. Nor to the statutes relating to the Reports of Accidents, May 6, 1910—36 Stat. 350.

The Warehouse Company meets the requirements of the Fair Labor Standards Act, and the hours of labor of its employees are regulated accordingly. It is also subject to the Pennsylvania Workmen's Compensation Act, P.L. of 1915, 736, as amended, and pursuant to the terms of that Act provides the required insurance for the payment of compensation.

The control of the Warehouse Company exercised by the Railroad Company is that only in the voting of stock. The business of the Warehouse Company is conducted under the direction of a Superintendent who possesses and exercises full authority as to its management and policies. The business is conducted altogether separate from that of The Pennsylvania Railroad Company or of any other railroad company; and whether the property handled at the

warehouse comes in by rail or moves out that way, is not essential to the operation of the Warehouse Company.

The facilities of the Warehouse Company at Erie, Pa., were in use only during the period August 1937 to 15 May 1938. That use was caused by an emergency with respect to price conditions on newsprint paper owned by the Pittsburgh Press, and during the above period commercially stored with the Warehouse Company at Erie, Pa. As 169 of May 1, 1941, the lease of those facilities was given up; and the Warehouse Company now performs no service whatever at Erie, Pa., and is not in a position to do so. In fact, it has performed no service there since 15 May 1938.

The warehouse services performed at Erie, Pa., were with respect to carlot shipments, and as to those services the precise situation prevailed as has always prevailed and prevails now with respect to carlot shipments, both inbound and outbound, at the warehouses of the Warehouse Company at East Liberty in Pittsburgh and at Pittsburgh proper. That situation was and is an accepted arrangement between the Warehouse Company and the Railroad Company that on inbound shipments when the cars are placed on the private siding of the Warehouse Company the railroad transportation is entirely ended, and delivery has been fully made by the Railroad Company to the Warehouse Company. Thereafter the unloading of the cars and any further handling of the property is entirely that of the Warehouse Company in commercial storage. As to such outbound shipments, the loading was and is performed by the Warehouse Company for and on account of the owner of the property, and delivery to the railroad is accomplished only when the loading has been completed and the bill of lading showing receipt of the property has been issued by the Railroad Company. It is only then that railroad transportation begins. The Warehouse Company at its warehouse at Erie, Pa., in 1937-38 had such a private siding; and has had during the period of its operations, and now has such private sidings at its warehouse at East Liberty in Pittsburgh and in Pittsburgh proper, both in Pennsylvania.

The Warehouse Company was a subscriber to the Warehouse Code approved by the President on 27 January 1934, effective 10 February 1934, and adopted pursuant to the

provisions of the National Industrial Recovery Act, 48 Stat. 195; and operated under that code during the balance of the life of the National Industrial Recovery Act. A copy of such Warehouse Code is here attached and marked Exhibit A; a copy of the subscribers to that code as of 31 January 1935 is hereto attached and marked Exhibit B, on page 4 of which under Pennsylvania appears the name of the Duquesne Warehouse Company.

Attached hereto and marked Exhibit C, is a copy of the agreement between the Warehouse Company and The Pennsylvania Railroad Company for the handling by the warehouse of such refused and unclaimed freight as may be delivered by the Railroad Company to the Warehouse Company.

170 For the year 1940 the gross revenues of the Warehouse Company with respect to property entitled to transit privilege, if and when shipped out, were $14,068.; from other general commercial storage $65,484.; from sale of salvage freight $11,877., and sub-leasing of space to tenants $27,172.

The approximate number of employees engaged in the storage work with respect to freight entitled to the transit privilege, if and when shipped out, was 10; with respect to other commercial storage 38; with respect to sale of salvage freight 3, and with respect to sub-leasing of space 4.

Of the space in the two plants at East Liberty and Pittsburgh proper, approximately 10% was devoted to operations with respect to freight entitled to the transit privilege if and when shipped out.

The transit privilege which is available to those goods which are handled and stored in the warehouses of the Warehouse Company at Pittsburgh and East Liberty is available to like goods handled and stored in any other warehouse at Pittsburgh and East Liberty. It is not limited to Duquesne.

171 THE PENNSYLVANIA RAILROAD COMPANY

Legal Department

Philadelphia, March 12, 1942

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General Solicitor

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Adelbert S. Schroeder,
Theodore K. Warner, Jr.
Assistant General Solicitors

Re: Duquesne Warehouse Company
Jurisdictional Docket No. 18

Mr. Murray W. Latimer, Chairman
Railroad Retirement Board
Washington, D. C.

Dear Sir:

In relation to this case there are here submitted two affidavits, one from H. B. Bietenduefel, Superintendent of the Warehouse Company, and verified 4 March 1942, and the other from Wilson V. Little, verified 2 March, 1942. Mr. Bietenduefel's affidavit covers three points. The first is with respect to change of agreement with The Pennsylvania Railroad Company, effective 2 January 1941, for the handling and disposition of over and refused and unclaimed damaged freight. This agreement supersedes the agree-

ment of 1 February 1922 between the same parties and covering the same matter and now in the record in this case. The second is a statement of the fact that the lease of the Warehouse Company covering warehouse facilities at Erie, Pennsylvania, was terminated as of 1 May 1941, and that the Warehouse Company has done no business there since that time and intends to do none in the future. The third is information as to another warehouse company at Pittsburgh handling sugar in practically the same way as Duquesne Warehouse handles sugar for another refiner.

The agreement as to salvaged freight was changed to express the actual practice of the parties, and the change was subsequent to my submission of a statement of facts on 14 February 1940. The termination of the lease at Erie was also subsequent to that submission. Reference to the other warehouse at Pittsburgh is prompted because of the General Counsel's opinion in the Northwestern Warehouse Company case dated 3 July 1941, L-41-315.

172 The affidavit of Mr. Little is with relation to the question of industry, and shows that for the warehouse industry a Code of Fair Competition was established under the National Industrial Relations Act for the Merchandise Warehousing Trade, and that Duquesne Warehouse Company was a subscriber to that Code. N.R.A. went out of existence as a result of the decision of the Supreme Court in the *Schechter* case in 1935. It had been assumed that the documents in connection with this matter were located at Washington, D. C. Our search, however, finally located them at Chicago, Illinois, and it has only been recently that we have been able to secure the information necessary to have it embodied in this affidavit.

These affidavits contain facts which have developed since our submission to the Board on 14 February 1940, and could not have been developed before. They are necessary to a complete statement of facts in the case. It is, therefore, requested that they be made a part of the statement of facts and of the record in the case. When that is done, I am satisfied to rest the case on the facts heretofore submitted to the Board, together with these two affidavits, and to have the proceeding decided accordingly.

Very truly yours,

GEORGE R. ALLEN

George R. Allen

Assistant General Counsel

gra-h
enc.

173 RAILROAD RETIREMENT BOARD

In the Matter of Duquesne Warehouse Company } Jurisdictional Docket No. 18

Commonwealth of Pennsylvania } ss.
County of Allegheny }

H. A. Bietenduefel being duly sworn deposes and says as follows:

That he is Superintendent of Duquesne Warehouse Company, the respondent in this proceeding, and is duly authorized to make this affidavit. Deponent further states that he is familiar with the nature of this proceeding.

Annexed hereto and made a part hereof is photostat copy of agreement between the Warehouse Company and The Pennsylvania Railroad Company, dated 2 January 1941, and covering the handling and disposition of over and refused and unclaimed damaged freight delivered to the Warehouse Company by the Railroad Company. This agreement cancelled the agreement between the same parties covering similar subject and dated 1 February 1922, a copy of which has heretofore been furnished the Retirement Board. Neither under the previous agreement nor the present agreement, nor otherwise, has the Warehouse Company ever made delivery of freight included in either or both of these agreements, or any other freight to the consignee or owner for or on behalf of The Pennsylvania Railroad Company or any other railroad company. Nor has the Warehouse Company ever disposed of, under any direction of the Railroad Company, any freight under either agreement which has become so worthless as to be unsalable.

As of 1 May 1941, the lease of the warehouse facilities of the Warehouse Company at Erie, Pennsylvania, was terminated, and the Warehouse Company has performed no warehouse services whatever there since the termination of the lease and is not in a position to do so.

Similar sugar arrangement which the Warehouse Company has with a sugar refining company has long been
174 availed of at Pittsburgh by another large sugar refining company located on the eastern seaboard. It makes carlot shipments of sugar to Pittsburgh, consigning the same to another warehouse company, neither owned nor

controlled by any carrier subject to Part I of the Interstate Commerce Act. That company has a warehouse located on the line of The Pennsylvania Railroad Company at Pittsburgh, and connected with which is a private siding. The sugar of that refinery is shipped from the eastern seaboard to the warehouse company over the line of The Pennsylvania Railroad Company, delivered by the Railroad Company to the warehouse company on its private siding, handled by the warehouse company while in its possession, and later distributed by the warehouse for the owner at Pittsburgh and throughout surrounding territory. Previous to 1942 much of this sugar was received by that warehouse company from The Pennsylvania Railroad Company, handled by the warehouse company, and then shipped out by the warehouse company over the line of The Pennsylvania Railroad Company under the transit provision in precisely the same way as the sugar of that other refinery is handled by Duquesne Warehouse Company at its East Liberty warehouse. This arrangement as to the sugar handled under the transit provision terminated with the year 1941 because of contractual arrangements between that warehouse company and that refining company.

H. A. BIETENDEUFEL

Sworn to before me this Fourth
day of March, 1942.
J. B. A. TRACEY
(Seal) Notary Public
My Commission expires April 1, 1943

175 SALVAGE FREIGHT AGREEMENT

This Agreement made this Second day of January, 1941, by and between The Pennsylvania Railroad Company, a corporation of the Commonwealth of Pennsylvania, hereinafter called the "Railroad", party of the first part, and Duquesne Warehouse Company, a corporation of the Commonwealth of Pennsylvania, hereinafter called the "Warehouse", party of the second part.

Witnesseth:

Whereas, the Railroad has from time to time in its possession over freight and also refused damaged and unclaimed damaged freight at its various stations along its

line of railroad, and desires to arrange with the Warehouse, but altogether on an independent contractor basis, for the receipt, handling and disposition of such over and damaged freight, and the Warehouse is willing to receive, handle and dispose of the same upon the terms and conditions hereinafter set forth;

Now, Therefore, in consideration of the premises and the mutual covenants and agreements hereinafter contained, the parties hereto covenant and agree as follows:

1. Any such over and damaged freight, except live stock, bulk freight or perishable freight, as the Railroad may desire to have handled and disposed of by the Warehouse in pursuance of this agreement, shall be transported by the Railroad to the City of Pittsburgh, Pa., and there delivered to the Warehouse as follows:

Immediately upon the arrival of any lot or lots of any such freight at Pittsburgh, the appropriate agent of the Railroad shall immediately notify the Warehouse of such arrival and of the place in Pittsburgh where the Warehouse may receive the freight, and the Warehouse shall thereupon promptly call for such lot or lots of such freight and remove the same to its Warehouse in Pittsburgh, first paying to the Railroad all lawful freight and other charges due upon the property at the time of such delivery.

Whenever any lot or lots of such freight may be delivered to the Warehouse as aforesaid, the Warehouse shall concurrently give to the agent of the Railroad from whom received a receipt in duplicate for each lot of such freight, and shall place on such freight receipt, both original and duplicate and also on the freight bill covering such freight, a lot number which shall be placed also with paint, crayon or other suitable means for marking on each lot or piece of freight covered by the said receipt and freight bill.

2. The Warehouse shall keep a detailed and accurate record of all sales made by it, together with a description of each piece, parcel or lot of freight sold, the amount of money received therefor, and all expenses in connection with each with said sale; and if requested by the Railroad, shall transmit to the Railroad, in duplicate, a complete and accurate copy of any such record; and the Railroad shall be entitled during working hours of any business day, to inspect the books, records, and papers of the Warehouse with respect to the matters here covered, and the Warehouse

shall give to any agent or representative of the Railroad appointed for that purpose, ready, convenient, and complete access to such books, papers, and records.

176 3. From the gross proceeds realized by the Warehouse at each such sale, the Warehouse shall receive a commission of ten per cent. (10%) upon the amount thereof, and shall also be entitled to deduct from such proceeds the amount of money, if any, actually paid by the Warehouse for reconditioning any piece, parcel or lot of such freight; drayage charges, if any, actually paid by the Warehouse for transporting such freight from the railroad station to the premises of the Warehouse; as well as all freight money and other charges paid by the Warehouse to the Railroad; and the balance of the gross proceeds shall be paid by the Warehouse to the Railroad not later than ten days after the date of such sale.

4. In the event that prior to any such sale, and in time to prevent the sale thereof, the true owner of any such over freight shall be ascertained, or the owner of any such damaged freight shall request delivery thereof, the Warehouse shall upon request of the Railroad return such freight to the Railroad upon payment to the Warehouse of all charges thereon which the Warehouse shall have paid to the Railroad as hereinbefore provided.

5. In the event that the total gross proceeds realized at any such sale do not equal the amount of the freight and other charges paid by the Warehouse to the Railroad, together with ten per cent. (10%) upon the amount of such gross proceeds which the Warehouse Company is entitled to receive, together with the amount, if any, actually paid by the Warehouse for reconditioning such freight; together with drayage charges, if any, actually paid by the Warehouse as aforesaid; then the Warehouse shall receive credit for the difference in the accounting hereunder between it and the Railroad.

Should any part of such freight handled by the Warehouse under this agreement be or become worthless so as to be unsalable, then the Warehouse shall dispose of such freight as in its judgment it may determine.

Should, at the request of the Railroad, any of such freight be returned by the Warehouse to the Railroad, then the Warehouse shall receive from the Railroad the amount of freight and other charges paid by the Warehouse to the

Railroad, and any drayage actually paid by the Warehouse, and any other expenditures actually made by the Warehouse in reconditioning the property, together with reasonable or lawful storage charges of the Warehouse.

6. The Warehouse shall at its own cost and expense keep the said freight delivered to it pursuant to this agreement insured against loss or damage or both by fire so as to afford protection hereunder fully adequate as to issuing company or companies, amount or amounts of coverage, and terms and conditions of policy or policies.

7. The Warehouse shall give to the Railroad a bond in the sum of Five Thousand Dollars ($5,000.00) with adequate corporate surety, conditioned upon the payment as herein provided by the Warehouse to the Railroad of all monies that may become due to the Railroad under this agreement, as well as the full performance by it, the Warehouse, of all other terms, conditions and covenants herein contained and to be kept and performed by the Warehouse.

177 8. It is mutually understood and agreed that the Warehouse shall be and remain an original and independent party hereunder, and shall employ, pay from its own funds and discharge all persons engaged in the performance of the work to be done by the Warehouse hereunder, and all such persons shall be and remain the sole employees of the Warehouse and subject to its exclusive direction and control.

The Warehouse admits and accepts exclusive responsibility on its part for any and all taxes, contributions or any payment whatever for old age or other pensions, unemployment compensation, or insurance, annuities or any benefits whatever of a social security nature imposed now or hereafter by any State or Federal statute or authority or arising thereunder with respect to its employees or their wages, salaries or other remuneration or compensation.

9. The Warehouse shall and it hereby expressly agrees to fully protect, indemnify and save harmless the Railroad from and against any and all claims, demands, actions, judgments, awards of any kind, damages, losses, costs, expense and liability of every kind and nature, including reasonable expenses which may arise or result directly or indirectly therefrom or on account of the negligence of the Warehouse, its agents, servants, representatives, in or

about the handling or disposition by the Warehouse of any of the freight delivered to it under this agreement.

The Warehouse shall also, and it hereby expressly agrees to be entirely and solely responsible for any and all liability, because of death or personal injury or other damage, to the employees or agents of the Railroad, employees or agents of the Warehouse, or any other person or persons whomsoever, arising from the acts or defaults of the Warehouse, its employees or agents, in connection with or resulting from any or all of the responsibilities or duties specifically mentioned or reasonably to be implied under this agreement, as well as in connection with the operation of the Warehouse in performance of this agreement.

10. This agreement cancels any agreement heretofore made by the parties hereto relative to the subject matter of this agreement. And this agreement inures to the benefit of the successors and assigns of the parties hereto, but neither party shall assign or otherwise transfer any of its rights or obligations hereunder without the written consent of the other. It shall become and be effective as of the date hereof, and shall continue in force to and including the thirty-first day of December, 1941, and thereafter from year to year unless sooner terminated in writing by either party to the other upon notice of one hundred and eighty (180) days, except as next provided. In the event of voluntary or involuntary general or other assignment by the Warehouse or any assignee consented to hereunder, for the benefit of creditors, or upon the taking or happening of any legal proceeding against the Warehouse, or any assignee assented to hereunder, in bankruptcy or reorganization or receivership proceedings or otherwise, this agreement may at its option be forthwith terminated by the Railroad upon service upon the Warehouse or such assignee of notice to that effect. And any such termination shall be without liability to the Railroad because of any damage whatsoever to the Warehouse or assignee, including any damages which may incidentally arise out of such termination because of expectable or anticipated profits.

178 Any such notice of termination as provided in this paragraph to the Railroad shall be served upon its Freight Claim Agent, at Philadelphia, Pennsylvania, and to the Warehouse upon its Superintendent at Pittsburgh,

Pennsylvania, and to any assignee consented to as provided herein upon such assignee, or in the absence of any such party, upon the person in charge of his office.

No breach of any of the terms or conditions of this agreement or failure to enforce the same shall be deemed or construed to be a waiver of any such terms or conditions.

In Witness Whereof, The parties hereto have caused this agreement to be executed in duplicate by their respective officers thereunto lawfully authorized this Second day of January, 1941.

THE PENNSYLVANIA RAILROAD COMPANY
By (Signed) J. C. White
General Manager

Witness:
(Signed) R. M. Harshman

DUQUESNE WAREHOUSE COMPANY
(Signed) E. W. Smith
President

Attest:
(Signed) J. G. Watson
Asst. Secretary

179. RAILROAD RETIREMENT BOARD

In the Matter of Duquesne Warehouse Company } Jurisdictional Docket No. 18

State of Illinois }
County of Cook } ss.

Wilson V. Little being duly sworn deposes and says, that he is Executive Secretary of the American Warehousemen's Association, Merchandise Division, with offices at 222 West Adams Street, Chicago, Illinois, and has continuously been such Secretary since 1 January 1926. There are two divisions of the Association, viz,, the Merchandise Division and the Cold Storage Division. The Asosciation is an organization whose membership is engaged in the merchandise and cold storage warehouse business.

Pursuant to Title I of the National Industrial Recovery Act, 48 Stat. 195, a Code of Fair Competition for the Merchandise Warehousing Trade was approved on behalf of the President of the United States on January 27, 1934,

by its terms became effective on February 10, 1934, and continued in effect until May 27, 1935, when it was terminated as a result of the case of *A. L. A. Schechter Poultry Corporation* v. *United States*, 295 U. S. 495. Attached hereto and made a part hereof and marked Exhibit A, is a true and correct copy of that Code printed by the United States Government Printing Office at Washington, D. C. Pursuant to the terms of the approval of the Code by the Administrator for Industrial Recovery the constitution and by-laws of the American Warehousemen's Association, Merchandise Division, were amended to the satisfaction of the Administrator. The number of the Code was 232 as shown on the title page.

180 Pursuant to Article VI of the Code, a Merchandise Warehousing Trade Code Authority was constituted to co-operate with the Administrator in the administration of the Code. Under authority of the same article, Section 2 (h), deponent became Secretary of the Code Authority and continued as such throughout the life of the Code. Among deponent's duties as such Secretary was that of the issuing of Certificates of Participation pursuant to Article VII of the Code, which certificates were in the form of display cards featuring the NRA Code "Blue Eagle" and having on each the serial number assigned to the member of the Trade to which it was issued.

Duquesne Warehouse Company was a member of the Merchandise Warehousing Trade, and as such had long been a member of our Asosciation. On January 31, 1934, it applied for a Certificate of Participation under the Code. On February 13, 1934, it was assigned Certificate No. 34-135, and was supplied with a rubber stamp for use in publicizing its participation in the Code, which stamp read "Subscriber to Merchandise Warehousing Trade Code. Certificate No. 34-135." The participation of Duquesne Warehouse Company in the Code of Fair Competition for the Merchandise Warehousing Trade continued throughout the duration of the Code. Annexed hereto and made a part hereof and marked Exhibit B, is a list of subscribers to the Merchandise Warehouse Code, dated May 2, 1934, which shows on page 3 under Pennsylvania, at Pittsburgh, Duquesne Warehouse Company. Likewise annexed hereto and made a part hereof and marked Exhibit C, is a similar list of subscribers to the Code, dated January 31, 1935, which

shows on page 4 under Pennsylvania, at Pittsburgh, Duquesne Warehouse Company.

WILSON V. LITTLE

Sworn to before me this
Second day of March, 1942.
JENNIE PINES.
(Seal) Notary Public

181 EXHIBIT A

Approved Code No. 232 Registry No. 1715—01

NATIONAL RECOVERY ADMINISTRATION

CODE OF FAIR COMPETITION

FOR THE

MERCHANDISE WAREHOUSING TRADE

As Approved on January 27, 1934

United States
Government Printing Office
Washington, 1934

For sale by the Superintendent of Documents,
Washington, D. C.—Price 5 cents

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183 Approved Code No. 232

CODE OF FAIR COMPETITION
FOR THE
MERCHANDISE WAREHOUSING TRADE
As Approved on January 27, 1934

ORDER

APPROVING CODE OF FAIR COMPETITION
FOR THE
MERCHANDISE WAREHOUSING TRADE

An application having been duly made pursuant to and in full compliance with the provisions of Title I of the National Industrial Recovery Act, approved June 16, 1933, for approval of a Code of Fair Competition for the Merchandise Warehousing Trade, and hearings having been duly held thereon and the annexed report on said Code, containing findings with respect thereto, having been made and directed to the President:

Now, Therefore, on behalf of the President of the United Sates, I, Hugh S. Johnson, Administrator for Industrial Recovery, pursuant to authority vested in me by Executive Orders of the President, including Executive Order No. 6543-A, dated December 30, 1933, and otherwise; do hereby incorporate by reference said annexed report and do find that said Code complies in all respects with the pertinent provisions and will promote the policy and purposes of said Title of said Act; and do hereby order that said Code of Fair Competition be and it is hereby approved; provided, however, that the continued participation of the Merchandise Division of the American Warehousemen's Association shall be contingent upon the amendment of the constitution and bylaws of such association to the satisfaction of the Administrator on or before February 15, 1934.

HUGH S. JOHNSON,
Administrator for Industrial Recovery.

Approval recommended:
A. D. WHITESIDE,
Division Administrator.
Washington, D.C.,
January 27, 1934.

184 The President,

The White House.

Sir: This is a report of the Hearing on the Code of Fair Competition for the Merchandising Warehousing Industry, conducted in the Willard Hotel, on October 27th, 1933. The Code which is attached was presented by duly qualified and authorized representatives of the Industry, complying with the statutory requirements, said to represent 80 percent of the space available for merchandise warehousing purposes.

THE INDUSTRY

The number of firms in this business aggregate 1,420. These firms utilize approximately 45,000,000 square feet out of a capacity of 75,000,000 square feet. Approximately 30,000 employees are affected by this Code.

It is estimated that employment of warehouse labor will be increased 14 percent by the establishment of the uniform 45 maximum hour week proposed by the Code. It is stated that the increase in weekly pay rolls under the proposed minimum wage will be 7 percent.

PROVISIONS OF THE CODE

The Code provides for a basic work week of 45 hours. The Code proposes wage rates with differentials established on the basis of size of city and region. The proposed minimum hourly wage rates vary from 27.5 to 40 cents. The minimum weekly wage rates proposed for clerical employees range from $13.00 to $15.00.

Under Article IV, Administration, the Code provides for a Code Authority of 12 members from the Trade and, at the discretion of the Administrator, three additional members from the government.

The Trade Practice Section of this Code is for the most part a codification of rules and regulations which have been well established by the association serving this Trade.

FINDINGS

The Deputy Administrator in his final report to me on said Code having found as herein set forth and on the basis of all the proceedings in this matter;

I find that:

(a) Said Code is well designed to promote the policies and purposes of Title I of the National Industrial Recovery Act, including removal of obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof and will provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among the trade groups, by inducing
and maintaining united action of labor and manage-
185 ment under adequate Governmental sanctions and
supervision, by eliminating unfair competitive practices, by promoting the fullest possible utilization of the present productive capacity of industries, by avoiding undue restriction of production (except as may be temporarily required), by increasing the consumption of industrial and agricultural products through increasing purchasing power, by reducing and relieving unemployment by improving standards of labor, and by otherwise rehabilitating industry.

(b) Said Trade normally employs not more than 50,000 employees; and is not classified by me as a major Industry.

(c) The Code as approved complies in all respects with the pertinent provisions of said Title of said Act, including without limitation Subsection (a) of Section 3, Subsection (a) of Section 7, and Subsection (b) of Section 10 thereof; and that the applicant association is a trade association truly representative of the aforesaid Trade; and that said association imposes no inequitable restrictions on admission to membership therein.

(d) The Code is not designed to and will not permit monopolies or monopolistic practices.

(e) The Code is not designed to and will not eliminate or oppress small enterprises and will not operate to discriminate against them.

(f) Those engaged in other steps of the economic process have not been deprived of the right to be heard prior to approval of said Code.

For these reasons, the Code has been approved.

Respectfully,

HUGH S. JOHNSON,
Administrator.

January 27, 1934.

186 CODE OF FAIR COMPETITION

FOR THE

MERCHANDISE WAREHOUSING TRADE

Article I—Purposes

To effectuate the policies of Title I of the National Industrial Recovery Act, the following provisions are established as a Code of Fair Competition for the Merchandise Warehousing Trade, and shall be the standard of Fair Competition for such trade, and shall be binding upon every member thereof.

Article II

The term "Merchandise Warehousing Trade", or "Trade", as used herein, includes the furnishing, for a consideration, of warehousing services for goods, wares and/or merchandise, except:

(a) Grain in bulk (grain elevators).

(b) Used household goods and/or used personal effects (household goods warehouses, parcel rooms, and safe deposit vaults).

(c) Used vehicles (public garages).

(d) Such goods, wares, and/or merchandise as require for their preservation artificial refrigeration below 45 degrees Fahrenheit (cold-storage warehouse).

(e) Warehousing services performed by those who are engaged in warehousing only agricultural commodities that are grown in their immediate area.

(f) Such warehousing services as may be required by the Interstate Commerce Act to be furnished by common carriers.

The term "employee" as used herein includes anyone engaged in the Merchandise Warehousing Trade in any capacity receiving compensation for his services, irrespective of the nature or method of payment of such compensation.

The terms "employer", "warehouseman", or "merchandise warehouseman", as used herein include anyone by whom any such employee is compensated or employed.

The term "member of the Trade" includes anyone engaged in the Merchandise Warehousing Trade as above defined, either as an employer or on his own behalf.

The term "Code Authority" as used herein means the Merchandise Warehousing Trade Code Authority, as provided for in Article VI of this Code.

187 The terms "President", "Act", and "Administrator" as used herein shall mean respectively the President of the United States, the National Industrial Recovery Act, and the Administrator of said Act.

Population for the purposes of this Code shall be determined by reference to the 1930 Federal Census.

Article III—Hours

Section 1. No employee shall be permitted to work in excess of forty-five (45) hours in any one week or eight (8) hours in any twenty-four (24) hour period, except as otherwise provided in this Article.

Sec. 2. The maximum hours fixed in the foregoing section shall not apply to: (a) Any employee in a managerial or executive capacity who receives more than thirty-five ($35.00) per week; (b) any employee on emergency work, but in any such special case one and one half (1½) times his hourly rate shall be paid for each hour worked in excess of eight (8) hours per day or forty-five (45) hours per week; (c) watchmen, who shall not be permitted to work in excess of fifty-four (54) hours in any one week or more than six (6) days in any consecutive seven (7) days.

Article IV—Wages

Section 1. (a) No warehouse labor shall be paid at less than the following hourly rates, regardless of whether an employee is compensated on a time rate, piecework or other basis:

Regions (as established in Article VI)

	In regions 3 and 7	In all other regions
In cities of more than 500,000 population	$0.325	$0.40
In cities of 50,000 to 500,000 population	.30	.375
In cities of less than 50,000 population	.275	.35

(b) No office or clerical employee shall be paid at less than the following weekly rates except office boys (16 to 18 years of age) who may be compensated at not less than 80%

of that amount, provided that the total number of those so compensated shall not exceed 10% of the total number of office employees, with a minimum of one:

In cities of more than 500,000 population	$15.00
In cites from 50,000 to 500,000 population	14.50
In cities of less than 50,000 population	13.50

(c) No office of clerical employee engaged on other than a weekly or longer employment basis shall be paid at less than forty (40) cents per hour in any of the Regions established in Article VI.

(d) No employee whose full-time weekly hours, as of July 1, 1933, are reduced, by reason of the provisions of Article III of this Code, by less than twenty percent (20%) shall have his full-time weekly earnings, as of July 1, 1933, reduced. No employee whose full-time weekly hours, as of July 1, 1933, are reduced, by reason of the provisions of Article III of this Code, in excess of twenty percent (20%) shall have his said earnings as of July 1, 1933, reduced by more than fifty percent (50%) of the amount calculated by multiplying the reduction in hours by the Code hourly rate.

Sec. 2. Each member of the Trade shall, within thirty (30) days after the effective date of this Code, effect an equitable adjustment of all wages above the minimum herein prescribed.

Article V—General Labor Provisions

Section 1. Each member of the Trade shall comply with the following requirements of the National Industrial Recovery Act:

(a) Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(b) No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.

(c) Employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President.

Sec. 2. No employer shall employ any person under sixteen (16) years of age.

Sec. 3. Within each State this Code shall not supersede any laws of such State imposing more stringent requirements on employers regulating the age of employees, wages, hours of work, or health, fire, or general working conditions than under this Code.

Sec. 4. Employers shall not reclassify employees or duties of occupations performed by employees so as to defeat the purposes of the Act.

Sec. 5. Each employer shall post in conspicuous places full copies of this Code.

Article VI—Administration

To further effectuate the policies of the Act, a Merchandise Warehousing Trade Code Authority is hereby constituted to cooperate with the Administrator in the administration of this Code.

Section 1. Organization and Constitution of Code Authority.

(a) The Code Authority shall consist of twelve (12) individuals from the Trade, ten (10) of whom shall be elected by members of the Trade and two of whom shall be the President and Vice President of the American Warehouseman's Association, Merchandise Division, or such other number as may be approved from time to time by the Administrator, to be elected as hereinafter provided, and of such additional members without vote, not to exceed three (3), as the Administrator, in his discretion, may appoint to represent such groups or governmental agencies as he may designate.

189 The Executive Committee of the American Warehousemans Association, Merchandise Division, shall arrange for the nomination and election of the Trade members of the Code Authority to be completed not later than sixty (60) days after the effective date of this code. Due and timely notice of such election shall be given to all members of the Trade who have complied with the terms of Section 3 of this Article. Each such member of the Trade shall be entitled to one vote in person or by proxy in the

nomination and election of the member of the Code Authority for his region. Nominations and election for each region shall be made in open meeting by plurality vote of the members of the Trade from the region.[1]

(b) The regions from which the ten (10) members of the Trade shall be elected are hereby established as follows:

Region No. 1.—Maine, New Hampshire, Vermont, Massachusetts, Connecticut, and Rhode Island.

Region No. 2.—New York, Pensylvania, New Jersey, Delaware, Maryland, and District of Columbia.

Region No. 3.—Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Tennessee, Kentucky, and West Virginia.

Region No. 4.—Ohio, Indiana, Illinois, Wisconsin (excluding Superior), and Michigan.

Region No. 5.—Minnesota; Superior, Wisconsin; North Dakota; South Dakota; and Montana.

Region No. 6.—Missouri, Iowa, Nebraska, and Kansas.

Region No. 7.—Texas, Louisiana, Arkansas, Oklahoma, and New Mexico.

Region No. 8.—Colorado, Utah, and Wyoming.

Region No. 9.—Washington, Oregon and Idaho.

Region No. 10.—California, Nevada, and Arizona.

The Chairman shall represent the territorial possessions of the United States.

(c) The President and Vice-President of the American Warehousemen's Association, Merchandise Division, shall be Chairman and Vice-Chairman respectively of the Code Authority. Pending election of the other members of the Code Authority as provided for in (a) of this Section, the President of the American Warehousemen's Association, Merchandise Division, shall appoint the other ten members of the Authority, with the approval of the majority of the members of the Executive Committee of the American Warehousemen's Asosciation, Merchandise Division, and with due regard for representation of Warehousemen's Associations in each respective region.

The ten (10) members appointed from the Trade shall serve for not more than sixty (60) days from the effective date of this Code. The elected members shall serve for a

[1] See paragraph 2 of order approving this Code.

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period of one year. Election of such members shall be held annually.

(d) Each Trade association directly or indirectly participating in the selection or activities of the Code Authority shall:

1. Impose no inequitable restrictions on membership, and

190 2. Submit to the Administrator true copies of its articles of association, bylaws, regulations, and any amendments when made thereto, together with such other information as to membership, organization, and activities as the Administrator may deem necessary to effectuate the purposes of the Act.

(e) In order that the Code Authority shall at all times be truly representative of the Trade and in other respects comply with the provisions of the Act, the Administrator may provide such hearings as he may deem proper; and thereafter if he shall find that the Code Authority is not truly representative or does not in other respects comply with the provisions of the Act, he may require an appropriate modification in the method of selection of the Code Authority.

(f) The Chairman, Vice Chairman, and Secretary of the Code Authority shall constitute the Administrative Committee, which shall exercise such authority and perform such duties as may be delegated to it by the Code Authority.

(g) The Treasurer of the American Warehousemen's Association, Merchandise Division, shall serve as the Treasurer of the Code Authority.

(h) The Executive Secretary of the American Warehousemen's Association, Merchandise Division, shall serve as the Secretary of the Code Authority.

Sec. 2 (a) The Code Authority shall have the following duties and powers to the extent permitted by the Act: to make such rules and regulations; procure such reports and other information; appoint such committees; and employ or designate such agents and delegate to them such duties and authority, as may be necessary.

(b) If the Administrator shall determine that any action of a code authority or any agency thereof is unfair or unjust or contrary to the public interest, the Administrator may require that such action be suspended for a

period of not to exceed thirty days to afford an opportunity for investigation of the merits of such action and further consideration by such code authority or agency pending final action, which shall be taken only upon approval by the Administrator.

(c) Nothing contained in this Code shall constitute the members of the Code Authority partners for any purpose. Nor shall any member of the Code Authority be liable in any manner to anyone for any act of any other member, officer, agent, or employee of the Code Authority. Nor shall any member of the Code Authority, exercising reasonable diligence in the conduct of his duties hereunder, be liable to anyone for any action or omission to act under this Code, except for his own willful misfeasance or nonfeasance.

Sec. 3. Members of the Trade shall be entitled to participate in and share the benefits of the activities of the Code Authority and to participate in the selection of the members thereof by assenting to and complying with the requirements of this Code and sustaining their reasonable share of the expenses of its formulation and administration. The Code Authority shall establish, assess and collect from each subscriber to this Code an initial annual fee, which shall become applicable and due upon the effective date of this Code, as follows: $24.00, plus $12.00 for each 10,000 square feet or fraction thereof, devoted to the conduct of the merchandise warehousing business as de-
191 fined in Article II, subject to a maximum annual fee of $264.00 for any one merchandise warehouseman.

Due and timely notice shall be sent to every member of the Trade whose name can be ascertained after diligent search that the requirements of this section must be complied with before such member will be entitled to a vote in the nomination and election of his Trade member of the Code Authority.

Adjustments in the amount of fees may be made from time to time by the Code Authority, subject to review by the Administrator, on the basis of capacity, volume of business, and/or such other factors as may be equitable to be taken into consideration.

Article VII—Certificate of Participation

Section 1. Upon payment of the fee prescribed in Article VI, Section 3, each member of the Trade, shall receive from the Code Authority a Certificate of Participation, serially numbered, showing that he is a subscriber to this Code.

Sec. 2. Commencing thirty (30) days after the effective date of this Code, every warehouse receipt issued by each member of the Trade shall bear a notation showing his certificate number and reading: "Subscribed to Merchandise Warehousing Trade Code. Certificate No. —."

Sec. 3. To further the purposes of Title I of the Act, each member of the Trade may otherwise display similar evidence of his participation in this Code.

Article VIII—Standardization of Warehousing Trade Practices

Each member of the Trade shall post in a conspicuous place, accessible to view, the following section:

Section 1. The following, the Standard Contract Terms and conditions, are hereby made a part of this Code of Fair Competition:

"As adopted by unanimous vote by representatives of the shippers, bankers, railway men, and warehousemen at a general conference, April 30, 1926, at the Department of Commerce, Washington, D. C., and indorsed October 30, 1926, by the Department of Commerce.

Section 1. Tender for Storage.—(a) All goods for storage shall be delivered at the warehouse properly marked and packed for handling. The storer shall furnish, at or prior to such delivery, a manifest showing marks, brands, or sizes to be kept and accounted for separately, and the class of storage desired; otherwise the goods may be stored in bulk or assorted lots, in freezer, cooler, or general storage, at the discretion of the warehousemen, and will be charged for accordingly.

(b) The word "lot" as used herein means the unit or units of goods for which a separate account is to be kept by the warehouseman. Delivery of all or any units of a lot shall be made without subsequent sorting except by special arrangement and subject to a charge.

(c) The warehouseman undertakes to store and deliver

goods only in the packages in which they are originally received.

192 Sec. 2. Storage period.—(a) All goods are stored on a month-to-month basis, unless otherwise provided. A storage month shall extend from a date in one calendar month to, but not including, the same date of the next and all succeeding calendar months, but if there be no corresponding date in the next succeeding calendar month, it shall extend to and include the last day of that month. When the last day of a final storage month falls on Sunday or a legal holiday, the storage month shall be deemed to expire on the next succeeding business day.

(b) Except where other procedure is provided by the warehouse receipts act, the warehouseman may, upon written notice to the storer of record and to any other person known by the warehouseman to claim an interest in the goods, require the removal of any goods by the end of the next succeeding month. Such notice shall be given by delivery in person or by registered letter addressed to the last known place of business or abode of the person to be notified.

Sec. 3. Insurance, Storage Rates, Expiration, and Transfers.—(a) All charges for storage are on a month-to-month basis unless otherwise provided. Charges for any particular lot shall begin at the receipt of the first unit of that particular lot in store and shall continue and include the storage month during which the last unit of the particular lot is delivered. Charges shall be made on the basis of the maximum number of units in any particular lot in store during a storage month. All charges for storage are due on the first day of a storage month, and all other charges are due when incurred.

(b) Instructions to transfer goods on the books of the warehouseman are not effective until delivered to and accepted by him, and all charges up to the time transfer is made are chargeable to the storer of record. If a transfer involves rehandling the goods, it will be subject to a charge.

(c) The warehouseman reserves the right to move, at his own expense of transfer, and upon notice sent by registered mail to the storer of record and to the last known holder of the negotiable warehouse receipt, any goods in storage from any room of the warehouse in which they may be stored to any other of his rooms or warehouses, but

if such storer or holder takes delivery of his goods in lieu of transfer, no storage charges shall be made for the current storage month.

(d) When rates are quoted by weight, they will, unless otherwise specified, be computed on gross weight, and 2,000 pounds shall constitute a ton.

(e) Goods are not insured nor do storage rates include insurance unless so specified in writing. (Adopted with the understanding that in any State requiring insurance by statute the words "or required by statute" would be considered a part of the standard terms and conditions.)

Sec. 4. Handing.—(a) Handling charges cover the ordinary labor and duties incidental to receiving goods at warehouse door, storing and delivering to warehouse door, but do not include unloading or loading of cars, vehicles, or vessels, unless so specified. Handling charges will be billed with the storage for the first month.

193 (b) Goods, at the request of a storer, received or delivered during other than usual business hours will be subject to an additional charge.

Sec. 5. Car Loading and Unloading.—(a) Charges for unloading or loading of cars include use of switch track, labor required to or from warehouse door, and billing of car.

(b) Dunnage and fastenings supplied by the warehouseman and used in loading out cars are chargeable to the storer.

(c) Any additional costs incurred by the warehouseman in unloading cars containing damaged goods are chargeable to the storer.

(d) The warehouseman, unless he has failed to exercise due care and diligence, shall not be responsible for demurrage, nor for delays in unloading inbound cars, nor for delays in obtaining cars for outbound shipments.

Sec. 6. Delivery Requirements.—(a) No goods shall be delivered or transferred except upon receipt by the warehouseman of complete instructions properly signed by the storer.

(b) When a negotiable receipt has been issued, no goods covered by that receipt shall be delivered or transferred on the books of the warehouseman unless the receipt, properly indorsed, is surrendered for cancellation or for indorsement of partial delivery thereon.

(c) When goods are ordered out, a reasonable time shall be given the warehouseman to carry out instructions; and if he is unable, due to causes beyond his control, to effect delivery before expiring storage dates, the goods will be subject to charges for another storage month; except when the warehouseman has given notice in accordance with the provisions of section 2 (b), or because of fire, acts of God, war, public enemies, seizure under legal process, strikes or lockouts, riots and civil commotions, if he is unable, due to causes beyond his control, to effect delivery before the expiring storage date, the goods shall be subject to storage charges only for that part of the month during which the goods remain in store.

Sec. 7. Bonded Stores.—A charge in addition to regular rates will be made for merchandise in bond.

Sec. 8. Minimum Charges.—A minimum charge will be assessed for storage, handling, and other services.

Sec. 9. Extra Service (a) Extra services in the interest of the storer, such as special warehouse space, material, drayage, repairing, coopering, sampling, weighing, repiling, inspection, physical warehouse checking, compiling stock statements, collections, revenue stamps, reporting marked weights or numbers, handling railroad expense bills, etc., are chargeable to the storer.

(b) Stock statements submitted in duplicate by the storer will be checked with the books of the warehouseman without charge.

(c) Shipping includes marking, tagging, billing, procuring, and forwarding bills of lading, and is chargeable to the storer.

(d) Freight and other disbursements made on behalf of the storer are due and payable on demand and subject to interest from date billed by the warehouseman.

(e) Stores, including holders of negotiable receipts, may, subject to insurance regulations and reasonable limitations, have access to their goods in store when accompanied by a warehouse employee whose time is chargeable to the storer.

194 Sec. 10. Liability.—(a) The responsibility of a warehouseman, in the absence of written provisions, is the reasonable care and diligence required by law.

(b) Perishable goods, or goods which are susceptible to damage through temperature changes or other causes incident to general storage, are accepted in general storage

only at owner's risk for such damages as might result from general storage conditions.

Sec. 11. Schedule of Charges.—Whenever provision is made in these standard contract terms and conditions for a charge or charges by the warehouseman, such charge or charges will conform to the warehousemen's tariff in effect at the time the charge accrues or the service is performed, except that no increase in charges within the direct control of the warehouseman will be made on goods that are in storage without a 30-day notice mailed to the storer of record or the last-known holder of a negotiable warehouse receipt.

Sec. 12. (a) The Standard Contract Terms and Conditions designate each of the following as a separate and distinct warehousing service:

Handling
Storage
Providing special warehouse space
Supplying material
Repairing or coopering
Sampling
Weighing
Repiling
Inspection
Special physical warehouse checking
Compiling special stock statements
Making collections of money in behalf of customer
Furnishing revenue stamps
Reporting marked weights or numbers
Payment of freight charges in behalf of customer
Shipping

(b) Other separate and distinct warehousing services are:

Drayage
Distribution of "pool" cars
Providing office space
Providing office service; special telephone service, invoicing for customers, etc.
Providing extra labor.

(c) Not to name an adequate and separate rate or charge for each of the services listed in subsection (a) of this Section 12 when making quotations, or not assess an adequate rate or charge (whether or not there is an existing

rate or charge) for each of the services listed in subsections (a) and (b) of this Section 12 when performed, shall be deemed a violation of this Code.

Such adequate rate or charge shall not be less than the lowest reasonable cost of the most efficient and lowest cost operator in the locality for the type of service for which the rate or charge is operative. Such reasonable cost shall comprehend fair and reasonable rates of pay to labor and include all other items of expense and overhead as determined by cost-accounting methods recognized in the
195 Trade and approved by the Code Authority, subject to the approval of the Administrator. Such reasonable cost may be approved or modified in conformity with the meaning of this Section by the Code Authority after due notice to and hearing for the members of the Trade in the locality, subject to review and modification by the Administrator.

Article IX—Tariffs

Within thirty (30) days after the effective date of this Code, each member of the Trade shall publish, post in a conspicuous place open to public inspection, and file with the Code Authority a tariff containing all rates, charges, terms and conditions covering his warehousing families and services, which rates, charges, terms, or conditions shall not be changed except upon the publication, posting, and filing of a new or supplemental tariff, to become effective ten (10) days thereafter.

Article X—Information and Reports

Section 1. Each member of Trade shall keep his records and books of account in such form as to facilitate furnishing the information that the Code Authority may require, subject to the approval of the Administrator.

Sec. 2. In addition to the information required to be submitted to the Code Authority, there shall be furnished to government agencies such statistical information as the Administrator may deem necessary for the purposes recited in Section 3 (a) of the Act.

Sec. 3. Information determined by the Code Authority to be of a confidential nature shall be strictly treated as such by any member of the Code Authority to whose attention such information may come.

Article XI—Unfair Trade Practices

The following practices constitute unfair methods of competition for members of the Trade and are prohibited:

1. To describe the merchandise warehousing business, the method used, facilities furnished or services rendered, or to quote rates or charges, or to state terms or conditions, in a manner that is misrepresentative or that has a tendency or capacity to deceive customers or prospective customers as the true character thereof in any particular.

2. To offer or make confidential or secret rates, charges, terms, or conditions, or to offer or make in any manner or by any device whatever, more advantageous rates, charges, terms, or conditions, to certain favored customers or prospective customers than are offered or made to all customers or prospective customers.

3. To defame competitors by falsely imputing to them dishonorable conduct, inability to perform contracts, questionable credit standing, or by other false representations or by the false disparagement of the grade or quality of their service.

4. To subsidize directly or indirectly, or offer to subsidize, customers, or prospective customers, or those
196 representing them, by contributions or subsidies of money, services, or other gratuities or things of value in the form of rebates, special concessions, payment of claims for loss or damage known to be fraudulent, or in any form, for the purpose or with the effect of inducing them to patronize or deal, or contract to patronize or deal, with the donor or of causing them to refrain from patronizing or dealing, or contracting to patronize or deal, with the donor's competitors.

5. To issue or aid in issuing a warehouse receipt when the products for which such receipt is issued have not been actually received by, or are not under the actual control of, the one issuing such receipt at the time of the issuance thereof.

6. To issue or aid in issuing a negotiable warehouse receipt for stored products of which the one issuing such receipt is owner, either solely or jointly or in common with others, without stating in said receipt the fact of such ownership.

7. To deliver part or all of any lot of stored products for which a negotiable warehouse receipt, the negotiation

of which would transfer the right to the possession of such products, has been issued and is outstanding and uncanceled, without obtaining the possession of such receipt, or taking up and canceling the same, or placing a statement plainly upon it of what products have been delivered, at or before the time of the delivery of such products, except where delivery thereof is made pursuant to an order of a court of competent jurisdiction or in compliance with a sale made to satisfy a lien thereon.

8. To issue fraudulently or aid in fraudulently issuing a warehouse receipt for stored products which contains any false statement.

9. To quote or charge a rate that is a departure from his tariff as provided in Article IX.

10. To use any subterfuge to evade any provisions of this Code, such as (but without limitation) renting or offering to rent warehouse space under such terms or conditions as would defeat the purposes of this Code.

Nothing in this Code shall limit the effect of any adjudication by the Courts or holding by the Federal Trade Commission on complaint, finding, and order, that any practice or method is unfair, providing that such adjudication or holding is not inconsistent with any provisions of the Act or of this Code.

Article XII—Modification of This Code

Section 1. This Code and all the provisions thereof are expressly made subject to the right of the President, in accordance with the provision of Section 10 (b) of the National Industrial Recovery Act, from time to time to cancel or modify any order, approval, license, rule, or regulation issued under Title I of said Act, and specifically, but without limitation, to the right of the President to cancel or modify his approval of this Code or any conditions imposed by him upon his approval thereof.

Sec. 2. It is contemplated that certain specialized branches of the Trade, by reason of their peculiar characteristics, may require separate subdivisions of this Code, or subsidiary codes, and that such subdivisions or subsidiary codes not inconsistent with the general provisions and intent of this Code may, with the approval of the Code Authority and of the Administrator, be made a part of this Code.

Sec. 3. This Code, except as to provisions required by the Act, may be modified on the basis of experience or changes in circumstances, such modification to be based upon application to the Administrator and such notice and hearing as he shall specify, and to become effective on approval of the Administrator.

Article XIII—Monopolies

No provision of this Code shall be so applied as to permit monopolies or monopolistic practices, or to eliminate, oppress or discriminate against small enterprises, or to permit or encourage unfair competition.

Article XIV—Effective Date

This Code shall become effective on the fourteenth day after its approval by the President.

Approved Code No. 232.
Registry No. 1715-01.

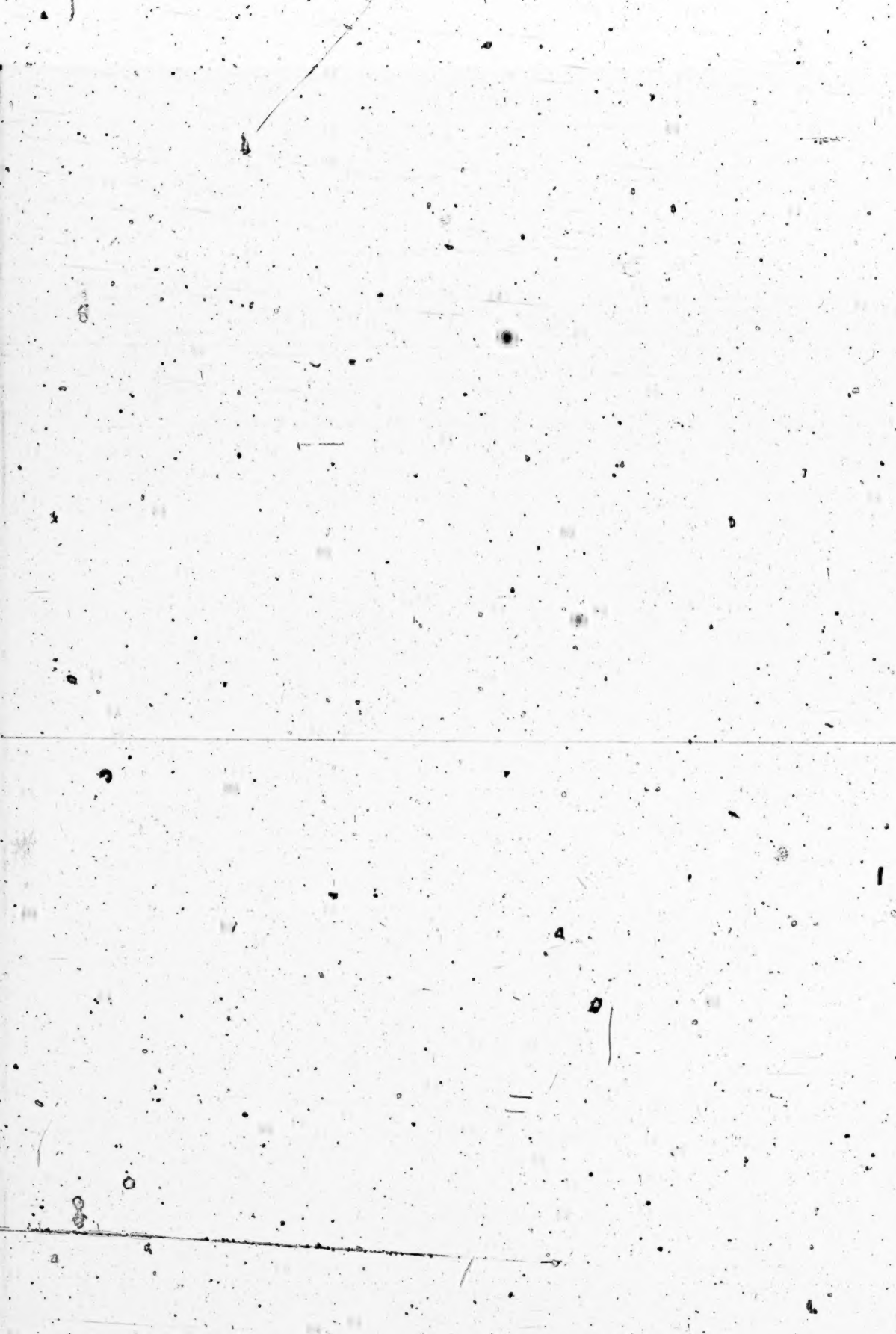

EXHIBIT B

5-5-34 | Memo. No. 2
Memo. No. 3-Sub. List
Bulletin No. 1
Bulletin No. 2

SUBSCRIBERS

To

MERCHANDISE WAREHOUSING TRADE CODE

May 2, 1934

669974 O - 35 (Face p. 206) No. 1

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REGION 1

CONNECTICUT

BRIDGEPORT
Bridgeport Storage Warehouse Co.
Hartford Despatch & Warehouse Co.
The W. M. Terry Co., Inc.

DANBURY
The Danbury Warehouse Co.

HARTFORD
Bill Brothers Co.
Boat Line Warehouse Co., Inc.
Hartford Despatch & Warehouse Co.
Whitaker & Bacon

MERIDEN
H. T. Smith Express Co.

NEW HAVEN
Davis Storage Co.
Durham Storage Co.
The Smedley Co.

NORWALK
L. J. Reynolds & Son

TORRINGTON
E. J. Kelley Co.

WATERBURY
The Blakeslee Co.

MAINE

BANGOR
McLaughlin Warehouse Co.

PORTLAND
Atlantic Storage & Warehouse, Inc.
Galt Block Warehouse Co.
New England Cold Storage Co., Inc.

MASSACHUSETTS

BOSTON
Atlas Terminal Stores, Inc.
Bankers Warehouse Co.
Big Three, Inc.
Boston Tidewater Terminal, Inc.
Central Warehouse Co.
Congress Stores, Inc.
Dexter Stores, Inc.
Eldridge Baker Co.
Fargo Stores, Inc.
Federal Warehouse, Inc.
Fitz Warehouse & Distributing Co.

MASSACHUSETTS (Continued)

CAMBRIDGE
Cambridge Terminal Warehouse Co.

EAST CAMBRIDGE, BOSTON
Hoosac Storage & Warehouse Co.

FALL RIVER
Fall River Warehouse Co.
Keogh Storage Co.
Mackenzie & Winslow, Inc.
Shellmound Warehouse Co.

HOLYOKE
Holyoke Storage Co.
Sheldon Transfer & Storage Co., Inc.

LOWELL
Atlantic States Whse. & Cold Stge. Co.
Lowell Public Warehouse Co., Inc.

LYNN
Lynn Storage Warehouse Co.

NEW BEDFORD
Belleville Warehouse Co.
Nauset Warehouse Co.
New Bedford Public Warehouse Co.
New Bedford Storage Whse. Co.
Prospect Warehouse Co.
Winslow-Mackenzie Co.

SOMERVILLE
The Vacuum Co.

SPRINGFIELD
Atlantic States Whse. & Cold Stge. Corp.
Connecticut Valley Storage Whse. Co.
Hartford Despatch & Warehouse Co.
A. J. Lane Co.
Litch Trucking Co.
Sturtevant-Calderwood Co.

WORCESTER
Colonial Warehouse & Distributing Co.

NEW HAMPSHIRE

LACONIA
F. S. Willey & Co., Inc.

MANCHESTER
McLane & Taylor

REGION 1

CONNECTICUT

BRIDGEPORT
- Bridgeport Storage Warehouse Co.
- Hartford Despatch & Warehouse Co.
- The W. M. Terry Co., Inc.

DANBURY
- The Danbury Warehouse Co.

HARTFORD
- Bill Brothers Co.
- Boat Line Warehouse Co., Inc.
- Hartford Despatch & Warehouse Co.
- Whitaker & Bacon

MERIDEN
- H. T. Smith Express Co.

NEW HAVEN
- Davis Storage Co.
- Durham Storage Co.
- The Smedley Co.

NORWALK
- L. J. Reynolds & Son

TORRINGTON
- E. J. Kelley Co.

WATERBURY
- The Blakeslee Co.

MAINE

BANGOR
- McLaughlin Warehouse Co.

PORTLAND
- Atlantic Storage & Warehouse, Inc.
- Galt Block Warehouse Co.
- New England Cold Storage Co., Inc.

MASSACHUSETTS

BOSTON
- Atlas Terminal Stores, Inc.
- Bankers Warehouse Co.
- Big Three, Inc.
- Boston Tidewater Terminal, Inc.
- Central Warehouse Co.
- Congress Stores, Inc.
- Dexter Stores, Inc.
- Eldridge Baker Co.
- Fargo Stores, Inc.
- Federal Warehouse, Inc.
- Fitz Warehouse & Distributing Co.
- J. L. Kelso Co.
- Manufacturers' Warehouse Co.
- Melchet Street Stores, Inc.
- Merchants Warehouse Co.
- North Station Industrial Bldg., Inc.
- Oelrichs & Co.
- Service Warehouse Co.
- Wiggin Terminals, Inc.
- D. S. Woodberry Co.

SOUTH BOSTON
- Andrew Square Warehouse
- Fort Point Warehouse

MASSACHUSETTS (Continued)

CAMBRIDGE
- Cambridge Terminal Warehouse Co.

EAST CAMBRIDGE, BOSTON
- Hoosac Storage & Warehouse Co.

FALL RIVER
- Fall River Warehouse Co.
- Keogh Storage Co.
- Mackenzie & Winslow, Inc.
- Shellmound Warehouse Co.

HOLYOKE
- Holyoke Storage Co.
- Sheldon Transfer & Storage Co., Inc.

LOWELL
- Atlantic States Whse. & Cold Stge. Co.
- Lowell Public Warehouse Co., Inc.

LYNN
- Lynn Storage Warehouse Co.

NEW BEDFORD
- Belleville Warehouse Co.
- Nauset Warehouse Co.
- New Bedford Public Warehouse Co.
- New Bedford Storage Whse. Co.
- Prospect Warehouse Co.
- Winslow-Mackenzie Co.

SOMERVILLE
- The Vacuum Co.

SPRINGFIELD
- Atlantic States Whse. & Cold Stge. Corp.
- Connecticut Valley Storage Whse. Co.
- Hartford Despatch & Warehouse Co.
- A. J. Lane Co.
- Litch Trucking Co.
- Sturtevant-Calderwood Co.

WORCESTER
- Colonial Warehouse & Distributing Co.

NEW HAMPSHIRE

LACONIA
- F. S. Willey & Co., Inc.

MANCHESTER
- McLane & Taylor

RHODE ISLAND

PAWTUCKET
- Darlington Warehouse Co.

PROVIDENCE
- The Cole Teaming Warehouse Co.
- Fox Point Warehouses, Inc.
- Merchants Cold Storage & Whse. Co.
- Terminal Warehouse Co. of R. I., Inc.

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REGION 2

DISTRICT OF COLUMBIA

WASHINGTON
- The Jacobs Transfer Co., Inc.
- The Terminal Storage Co. of Washington
- Terminal Refrigerating & Warehousing Corporation

MARYLAND

BALTIMORE
- Baltimore Fidelity Warehouse Co.
- Belt's Wharf Warehouses, Inc.
- Camden Warehouses
- Canton Co. of Baltimore
- Central Warehouse Co., Inc.
- McCormick Warehouse Co., Inc.
- Merchants Terminal Corp.
- Ruckert Terminal Corp.
- The Terminal Warehouse Co. of Baltimore City

CUMBERLAND
- Baltimore Fidelity Warehouse Co.

SALISBURY
- Dennis Storage & Moving Co.

NEW JERSEY

ATLANTIC CITY
- National Storage Warehouse Co.

CARLTON HILL
- Metropolitan Warehouse Co., Inc.

ELIZABETH
- Bayway Terminal
- Weimar Storage Co., Inc.

HOBOKEN
- Campbell Stores
- Hoboken Dock Co.
- United States Testing Co., Inc.

JERSEY CITY
- Harborside Warehouse Co.
- Jersey City Stores, Inc.
- Lackawanna Terminial Warehouses, Inc.
- Long Dock Co.

NEWARK
- Job De Camp, Inc.
- Essex Warehouse Co.
- Lehigh Warehouse & Trans. Co.
- Mercur Corp.
- Newark Warehouse Co.
- Wayerly Stge. & Whse. Co., Inc.

PATERSON
- Paterson Storage Co.

NEW YORK

ALBANY
- Albany Term. & Sec. Warehouse Co., Inc.

NEW YORK (Continued)

- South Eleventh Street Whse. Corp.
- Tooker Storage & Forwarding Co.
- Wallabout Basin Storage & Term. Co., Inc.
- The S. M. Wheeler Warehouse Co.

BUFFALO
- Buffalo Freight Terminal Warehouse Co.
- Buffalo Storage & Carting Co.
- Keystone Warehouse Co.
- Knowlton Warehouse Co.
- Larkin Co., Inc.
- The Market Terminal Warehouse
- Monarch Storage & Whse. Co.
- M. Moran Transportation Lines, Inc
- Seneca Terminal & Storage Corp.
- Terminals & Transportation Corp. of Amer.

ELMIRA
- Joseph Bimberg Sons
- A. C. Rice Storage Corp.

FAIRPORT
- Fairport Storage & Ice Corp.

HILTON
- Hilton Milling & Warehouse Co., Inc.

ITHACA
- Dean of Ithaca, Inc.

JAMESTOWN
- Chautauqua Storage & Transfer Co.

NEW YORK
- Acker & Co., Inc.
- American Dock Co.
- Arbuckle Brothers
- Atlantic Tidewater Terminals
- Baker & Williams
- Baltimore & Ohio Stores, Inc.
- Beards' Erie Basin, Inc.
- Wm. R. Boyce & Son, Inc.
- Bronx Refrigerating Co.
- Brookhattan Terminal Warehouse Corp.
- Bush Terminal Co.
- Columbia Storage Warehouses
- Henry J. Comens, Inc.
- Commercial Stores, Inc.
- Continental Milling & Whse. Co., Inc.
- Theodore Crowell, Inc.
- Daniels & Kennedy, Inc.
- Fidelity Warehouse Co.
- W. S. Forbes & Company
- Gough & Semke, Inc.
- C. C. Hamilton & Co., Inc.
- Harris Warehouse, Inc.
- James J. Harrison
- Heermance Storage & Refrigerating Co.
- Independent Warehouses, Inc.
- Insular Terminal Corporation
- Jane Street Warehouse
- Kierstead Warehouse & Forwarding Co., Inc.
- Kingsbridge Auto Storage & Whse. Co., Inc.
- L. & F. Stores
- Lehigh Harlem River Terminal Whse., Inc.
- Liberty Storage & Warehouse Co.
- Lincoln-Tidewater Terminals, Inc.
- F. C. Linde Co.
- The Long Dock Co.
- The Manhattan Storage & Warehouse Co.
- T. I. McCormack Trucking Co., Inc.
- The Jay A. Mellish Warehouse, Inc.

Belt's Wharf Warehouses, Inc.
Camden Warehouses
Canton Co. of Baltimore
Central Warehouse Co., Inc.
McCormick Warehouse Co., Inc.
Merchants Terminal Corp.
Rocket Terminal Corp.
The Terminal Warehouse Co. of Baltimore City

CUMBERLAND
Baltimore Fidelity Warehouse Co.

SALISBURY
Dennis Storage & Moving Co.

NEW JERSEY

ATLANTIC CITY
National Storage Warehouse Co.

CARLTON HILL
Metropolitan Warehouse Co., Inc.

ELIZABETH
Bayway Terminal
Weimar Storage Co., Inc.

HOBOKEN
Campbell Stores
Hoboken Dock Co.
United States Testing Co., Inc.

JERSEY CITY
Harborside Warehouse Co.
Jersey City Stores, Inc.
Lackawanna Terminal Warehouses, Inc.
Long Dock Co.

NEWARK
Job De Camp, Inc.
Essex Warehouse Co.
Lehigh Warehouse & Trans. Co.
Mercur Corp.
Newark Warehouse Co.
Waverly Stge. & Whse. Co., Inc.

PATERSON
Paterson Storage Co.

NEW YORK

ALBANY
Albany Term. & Sec. Warehouse Co., Inc.
Central Railway Terminal & Cold Storage Co., Inc.
Roberts Terminal Warehouse Co.

BINGHAMTON
E. W. Conklin & Son
C. G. Yager & Co., Inc.

BROOKLYN
Bisco Warehouse Corp.
Bowne-Morton's Stores, Inc.
Brooklyn Terminal Stores, Inc.
Brooklyn Waterfront Terminal
Butlers Warehouses, Inc.
Greenpoint Terminal Corp.
Jay Street Terminal
Ed. J. Mooney
Monarch Storage & Whse. Co.
M. Moran Transportation Lines, Inc
Seneca Terminal & Storage Corp.
Terminals & Transportation Corp. of Amer.

ELMIRA
Joseph Bimberg Sons
A. C. Rice Storage Corp.

FAIRPORT
Fairport Storage & Ice Corp.

HILTON
Hilton Milling & Warehouse Co., Inc.

ITHACA
Dean of Ithaca, Inc.

JAMESTOWN
Chautauqua Storage & Transfer Co.

NEW YORK
Acker & Co., Inc.
American Dock Co.
Arbuckle Brothers
Atlantic Tidewater Terminals
Baker & Williams
Baltimore & Ohio Stores, Inc.
Beards' Erie Basin, Inc.
Wm. R. Boyce & Son, Inc.
Bronx Refrigerating Co.
Brookhattan Terminal Warehouse Corp.
Bush Terminal Co.
Columbia Storage Warehouses
Henry J. Comens, Inc.
Commercial Stores, Inc.
Continental Milling & Whse. Co., Inc.
Theodore Crowell, Inc.
Daniels & Kennedy, Inc.
Fidelity Warehouse Co.
W. S. Forbes & Company
Gough & Semke, Inc.
C. C. Hamilton & Co., Inc.
Harris Warehouse, Inc.
James J. Harrison
Heermance Storage & Refrigerating Co.
Independent Warehouses, Inc.
Insular Terminal Corporation
Jane Street Warehouse
Kierstead Warehouse & Forwarding Co., Inc.
Kingsbridge Auto Storage & Whse. Co., Inc.
L. & F. Stores
Lehigh Harlem River Terminal Whse., Inc.
Liberty Storage & Warehouse Co.
Lincoln-Tidewater Terminals, Inc.
F. C. Linde Co.
The Long Dock Co.
The Manhattan Storage & Warehouse Co.
T. I. McCormack Trucking Co., Inc.
The Jay A. Mellish Warehouses, Inc.
Merchants Refrigerating Co.
Midtown Warehouse, Inc.
The National Cold Storage Co., Inc.
National Storage Co.
New York Dock Co.
William H. Norman, Inc.
North River Stores, Inc.
Old Slip Warehouse, Inc.
Pennsylvania Storage Warehouse, Inc.
Piers, Inc.
Port Warehouses, Inc.
Pouch Terminal, Inc.
Railroad Stores, Inc.
Republic Storage Co., Inc.
Rex Warehouses, Inc.
C. Rudolph Warehouse Company, Inc.

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NEW YORK (Continued)

Ruhe Storage & Trucking Co., Inc.
H. W. St. John & Co.
Seaboard Storage Corporation
Robert Shaw's U. S. Bonded Warehouses
Shephard Warehouse, Inc.
State Warehouse Co., Inc.
Henry I. Stetler, Inc.
Sunset Warehouses, Inc.
Terminal Warehouse Co.
Towers Warehouses, Inc.
Unity Warehouse Co.
Vestry Warehouses, Inc.
Warwick Thomson Co.

OSWEGO
Wallace Storage Warehouse

ROCHESTER
B. R. & P. Warehouse, Inc.
Blanchard Storage Co., Inc.
C. & D. Warehouse Corp.
Geo. M. Clancy Carting Co., Inc.
Clancy Carting & Storage Co., Inc.
B. G. Costich & Sons, Inc.
Exchange Warehouse Co., Inc.
Rochester Storage Warehouses
Service Storage Co.
The Upton Cold Storage Co., Inc.

SCHENECTADY
Schenectady Storage & Trucking Co.

STAPLETON
Richmond Terminal Trucking Co.

SYRACUSE
Flagg Storage Warehouse Co.
Great Northern Warehouses
King Storage Warehouse Co., Inc.
Shefford Warehouse

UTICA
Broad Street Warehouse Corp.
Jones-Clark Trucking & Storage Co., Inc.
Murray Warehouse Co., Inc.
Utica Warehouse Co., Inc.

WATERTOWN
Marcy-Buck & Winslow, Inc.

YORKVILLE
Utica Warehouse Co.

PENNSYLVANIA

BETHLEHEM
Lehigh & New England Terminal Whse. Co.

PENNSYLVANIA (Continued)

ERIE
Erie Storage & Carting Co.
Fort Erie Warehouse & Docks

HARRISBURG
Harrisburg Warehouse Co.
Montgomery & Co.

HAZELTON
Karn's Transfer & Storage

PHILADELPHIA
Bailey Warehouses
Commercial Warehousing Co
Fenton Storage Co.
Gallagher's Warehouses
General Warehouses Co.
Godley's Storage Warehouses
Merchants Warehouse Co.
Northeastern Warehouse Co.
Pennsylvania Warehousing & Safe Deposit Co.
Phila. Tidewater Terminal
Philadelphia Warehousing & Cold Stge. Co.
Rex & Co., Inc.
Terminal Commerce Building, Inc.
Terminal Warehouse Co.
Traders Warehouse

PITTSBURGH
W. J. Beitler Warehouse
Buley-Patterson-Potts Co.
Consolidated Storage Company
Duquesne Warehouse Co.
Iron City Elevator Co., Inc.
Kirby Transfer & Storage Co.
Pittsburgh Terminal Warehouse & Transfer Co.
South-Side Transfer & Storage Co.
Superior Transfer & Storage Co.
Try Street Terminal Co.
Union Storage Co.
United Storage & Trucking Co.
White Terminal Co.

READING
Columbian Warehouse Co.
Wertz Warehouse Co.

SCRANTON
Quackenbush Warehouse Co.

WILKES-BARRE
Matheson Warehouse Co.
Merchants Warehousing Co.
Wilkes-Barre Warehousing Co.

WILLIAMSPORT
Williamsport Storage Co., Inc.

REGION 3

ALABAMA

ANNISTON
Nixon Transfer & Coal Co.

BIRMINGHAM

FLORIDA

JACKSONVILLE
Central Warehouse & Distributing Co.
Laney & Delcher Storage Co.
Peninsular Warehouse Co.

B. R. & P. Warehouse, Inc.
Blanchard Storage Co., Inc.
C. & D. Warehouse Corp.
Geo. M. Clancy Carting Co., Inc.
Clancy Carting & Storage Co., Inc.
B. G. Costich & Sons, Inc.
Exchange Warehouse Co., Inc.
Rochester Storage Warehouses
Service Storage Co.
The Upton Cold Storage Co., Inc.

SCHENECTADY
Schenectady Storage & Trucking Co.

STAPLETON
Richmond Terminal Trucking Co.

SYRACUSE
Flagg Storage Warehouse Co.
Grest Northern Warehouses
King Storage Warehouse Co., Inc.
Shefford Warehouse

UTICA
Broad Street Warehouse Corp.
Jones-Clark Trucking & Storage Co., Inc.
Murray Warehouse Co., Inc.
Utica Warehouse Co., Inc.

WATERTOWN
Marcy-Buck & Winslow, Inc.

YORKVILLE
Utica Warehouse Co.

PENNSYLVANIA

BETHLEHEM
Lehigh & New England Terminal Whse. Co.
Merchants Warehouse Co.
Northeastern Warehouse Co.
Pennsylvania Warehouseing & Safe Deposit Co.
Phila. Tidewater Terminal
Philadelphia Warehousing & Cold Stge. Co.
Rex & Co., Inc.
Terminal Commerce Building, Inc.
Terminal Warehouse Co.
Traders Warehouse

PITTSBURGH
W. J. Beitler Warehouse
Buley-Patterson-Potts Co.
Consolidated Storage Company
Duquesne Warehouse Co.
Iron City Elevator Co., Inc.
Kirby Transfer & Storage Co.
Pittsburgh Terminal Warehouse & Transfer Co.
South Side Transfer & Storage Co.
Superior Transfer & Storage Co.
Try Street Terminal Co.
Union Storage Co.
United Storage & Trucking Co.
White Terminal Co.

READING
Columbian Warehouse Co.
Wertz Warehouse Co.

SCRANTON
Quackenbush Warehouse Co.

WILKES-BARRE
Matheson Warehouse Co.
Merchants Warehousing Co.
Wilkes-Barre Warehousing Co.

WILLIAMSPORT
Williamsport Storage Co., Inc.

REGION 3

ALABAMA

ANNISTON
Nixon Transfer & Coal Co.

BIRMINGHAM
Acme Storage & Transfer Co.
Alabama Warehousing Co.
Fleming Transfer & Warehouse Co., Inc.
Goodman Transfer & Warehouse Co.
Harris Transfer & Warehouse Co.
Shaw Warehouse Co.
Strickland Transfer & Storage Co.
Wittichen Transfer & Warehouse Co.

MOBILE
Alabama Warehousing Co.
Merchants Transfer Co.
United Warehouse Co., Inc.

MONTGOMERY
Alabama Motor Transfer & Warehouse Co.
Moeller Transfer & Storage Co.

FLORIDA

JACKSONVILLE
Central Warehouse & Distributing Co.
Laney & Delcher Storage Co.
Peninsular Warehouse Co.
Service Warehouse Co., Inc.
Union Terminal Warehouse Co.
Vann Warehouse Co.
Wiesenfeld Warehouse Co.

MIAMI
Apte Brothers
J. F. Chaille Co. Warehouse
A. Earl Clark & Son, Inc.
Fireproof Storage Warehouses, Inc.
Flash Express & Storage Co., Inc.
L. A. Jones, Inc.
Rickert Warehouse & Stge. Co., Inc.
Robbin's Warehouse & Distributing Co.
John E. Withers Transfer & Stge. Co., Inc.

ORLANDO
Fidelity Storage & Warehouse Co.

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FLORIDA (Continued)

PENSACOLA
Ferriss Warehouse & Storage Co.
Ray Hardware & Truck Co. operating the Bonded Whse. Co.

TAMPA
W. L. Blocks
Caldwell Bonded Warehouse Company
Ice Terminal & Warehouse Corp.
Tampa Stevedoring Co., Inc.
Tampa Union Terminal Co.
The Warehouse Inc.

WEST PALM BEACH
Brandon Transfer & Storage Co.

GEORGIA

ATLANTA
Atlanta Service Warehouse
Bonded Service Warehouse
J. A. Campbell, Inc.
Capitol City Warehouse Co.
Food Sales Co., Inc.
Fulton Warehouse Co.
General Warehouse & Storage Co., Inc.
Loeb-Apte Company
M. & M. Warehouse Co., Inc.
Martin & Zeagler, Inc.
Massey & Fair Inc.
Monroe Bonded Warehouses
C. B. Ponder Company
Pyburn Co.
Raley Brothers, Inc.
Security Warehouse Co.
Southeastern Bonded Warehouses
Terminal Warehouse Co.

AUGUSTA
City Bonded Warehouse
Farmers & Merchants Bonded Warehouse

MACON
Washburn Bonded Warehouse, Inc.

SAVANNAH
Savannah Bonded Whse. & Tfr. Co.
South Atlantic Storage Co.

KENTUCKY

CORBIN
A. J. Seibert Co., Inc.

LEXINGTON
Union Transfer & Storage Co.
Vine St. Stge. & Whse. Co.

LOUISVILLE
Denny Motor Transfer Co., Inc.
Falls City Warehouse Co., Inc.
Huber & Huber Motor Express Terminal
Industrial Storage Co., Inc.
Kentucky Term. Whse. & Storage Co.
Lamppin Warehouse Co.
Louisville Public Warehouse Co.
Ninth Street Public Warehouse
A. J. Seibert Co., Inc., Props.
Louisville Sugar House

NORTH CAROLINA

ASHEVILLE
Consolidated Warehouse Co.

CHARLOTTE
American Storage & Warehouse Co.
H. C. Anderson & Sons
Robert R. Beatty
Britt-Shiver-Norcom, Inc.
A. J. Campbell Co.
Carolina Transfer & Storage Co.
Charlotte Distributing Co.
W. J. Edwards & Co.
Kilgo Transfer Co., Inc.
Avery R. Rhyne
Standard Bonded Warehouses
Union Storage & Warehouse Co.

GREENSBORO
South Atlantic Bonded Warehouse Corp.

HIGH POINT
Carolina Bonded Warehouse Co.
High Point Bonded Warehouse Co.

RALEIGH
Carolina Storage & Distributing Co.
Raleigh Bonded Warehouse, Inc.

WINSTON-SALEM
Lentz Transfer & Storage Company

SOUTH CAROLINA

CHARLESTON
Charleston Warehouse & Forwarding Co.
George F. Martin
Piedmont Coastal Motor Express Corp.

COLUMBIA
Boineau's, Inc.
Carolina Bonded Storage Co.
Piedmont Coastal Motor Exp. Corp.

GREENVILLE
F. H. Edwards Co.
Piedmont Coastal Motor Express Corp.
Textile Warehouse Co.

SPARTANBURG
Piedmont Coastal Motor Express Corp.

TENNESSEE

CHATTANOOGA
Arrow Transfer & Storage Co.
Chattanooga Transfer & Storage Co.
Crabtree Transfer & Storage Co., Inc.

EAST CHATTANOOGA
Textile Storage & Warehouse Co.

KNOXVILLE
Fireproof Storage & Van Co.

MEMPHIS
Commercial Storage & Warehouse Co.
Dunbar Transfer & Storage Co., Inc.
General Whse. & Distributing Co.
Memphis Bonded Warehouse Co.
Merchants Warehouse Co.
Industrial Supplies Warehouse
P. & B. Transfer & Stge. Co., Inc.
Patterson Transfer Co.
John H. Poston Stge. Warehouses, Inc.
Rose Warehouse Co.
Southern Bonded Warehouse Co.

Tampa Stevedoring Co., Inc.
Tampa Union Terminal Co.
The Warehouse Inc.

WEST PALM BEACH
Brandon Transfer & Storage Co.

GEORGIA

ATLANTA
Atlanta Service Warehouse
Bonded Service Warehouse
J. A. Campbell, Inc.
Capitol City Warehouse Co.
Food Sales Co., Inc.
Fulton Warehouse Co.
General Warehouse & Storage Co., Inc.
Loeb-Apte Company
M. & M. Warehouse Co., Inc.
Martin & Zeagler, Inc.
Massey & Fair Inc.
Monroe Bonded Warehouses
C. B. Ponder Company
Pyburn Co.
Raley Brothers, Inc.
Security Warehouse Co.
Southeastern Bonded Warehouses
Terminal Warehouse Co.

AUGUSTA
City Bonded Warehouse
Farmers & Merchants Bonded Warehouse

MACON
Washburn Bonded Warehouse, Inc.

SAVANNAH
Savannah Bonded Whse. & Tfr. Co.
South Atlantic Storage Co.

KENTUCKY

CORBIN
A. J. Seibert Co., Inc.

LEXINGTON
Union Transfer & Storage Co.
Vine St. Stge. & Whse. Co.

LOUISVILLE
Denny Motor Transfer Co., Inc.
Falls City Warehouse Co., Inc.
Huber & Huber Motor Express Terminal
Industrial Storage Co., Inc.
Kentucky Term. Whse. & Storage Co.
Lamppin Warehouse Co.
Louisville Public Warehouse Co.
Ninth Street Public Warehouse
A. J. Seibert Co., Inc., Props.
Louisville Sugar House
Tabb Storage Whse. & Frt. Transfer Line

MISSISSIPPI

JACKSON
Ricks Storage Co.

MERIDIAN
Smith Transfer & Storage Co.

VICKSBURG
Z. B. Schwarz & Co.

Charlotte Distributing Co.
W. J. Edwards & Co.
Kilgo Transfer Co., Inc.
Avery R. Rhyne
Standard Bonded Warehouses
Union Storage & Warehouse Co.

GREENSBORO
South Atlantic Bonded Warehouse Corp.

HIGH POINT
Carolina Bonded Warehouse Co.
High Point Bonded Warehouse Co.

RALEIGH
Carolina Storage & Distributing Co.
Raleigh Bonded Warehouse, Inc.

WINSTON-SALEM
Lentz Transfer & Storage Company

SOUTH CAROLINA

CHARLESTON
Charleston Warehouse & Forwarding Co.
George F. Martin
Piedmont Coastal Motor Express Corp.

COLUMBIA
Boineau's, Inc.
Carolina Bonded Storage Co.
Piedmont Coastal Motor Exp. Corp.

GREENVILLE
F. H. Edwards Co.
Piedmont Coastal Motor Express Corp.
Textile Warehouse Co.

SPARTANBURG
Piedmont Coastal Motor Express Corp.

TENNESSEE

CHATTANOOGA
Arrow Transfer & Storage Co.
Chattanooga Transfer & Storage Co.
Crabtree Transfer & Storage Co., Inc.

EAST CHATTANOOGA
Textile Storage & Warehouse Co.

KNOXVILLE
Fireproof Storage & Van Co.

MEMPHIS
Commercial Storage & Warehouse Co.
Dunbar Transfer & Storage Co., Inc.
General Whse. & Distributing Co.
Memphis Bonded Warehouse Co.
Merchants Warehouse Co.
Industrial Supplies Warehouse
P. & B. Transfer & Stge. Co., Inc.
Patterson Transfer Co.
John H. Poston Stge. Warehouses, Inc.
Rose Warehouse Co.
Southern Bonded Warehouse Co.
Tennessee Terminal Warehouses, Inc.
United Warehouse & Terminal Co.
P. H. Vernon Warehouse Co.

NASHVILLE
Bond, Chadwell Co.
Central Van & Storage Co.
The Price-Bass Co.
Nashville Warehouse & Elevator Corp.
Henry W. Sawrie Co.
R. H. White Transfer & Storage Co.

PARIS
Union Transfer Co.

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VIRGINIA

LYNCHBURG
Lynchburg Storage Co.

NEWPORT NEWS
Hiden Storage & Forwarding Co.

NORFOLK
The Bell Storage Co., Inc.
D. D. Jones Transfer & Whse. Co.
Jones Cold Storage Corp.
Norfolk Tidewater Terminals
H. B. Rogers, Inc.
Security Storage & Safe Deposit Co., Inc.
Southgate Storage Co.
Virginia-Carolina Storage Corp.
West Storage Co.

PETERSBURG
Petersburg Bonded Warehouse Corp.

RICHMOND
Terminal Storage Corp.
Virginia Bonded Whse. Corp.

VIRIGINA (Continued)

ROANOKE
H. L. Lawson, Jr., Finance & Storage Co.
Pitzer Transfer Corp.
Roanoke Public Warehouse.

WEST VIRGINIA

BLUEFIELD
City Warehouse Co.
Flat Top Warehouse Company
General Storage Co.

CHARLESTON
Elk Storage Warehouse Co.
Nelson Transfer & Storage Co.

CLARKSBURG
Central Storage Co.

HUNTINGTON
Maier Sales & Storage Co.

WHEELING
Union Warehouse Holding Co.

REGION 4

ILLINOIS

AURORA
Martin Transfer & Storage Co., Inc.
Valentine Transfer & Storage Co.

BELLEVILLE
W. L. Batdorf & Co.
F. J. Hessler & Sons, Inc.

BLOOMINGTON
The Johnson Transfer & Fuel Co.

CAIRO
Cairo River & Rail Warehouses
Halliday Warehouse Co.
Pink & Co., Inc.

CHAMPAIGN
Champaign Stge. & Whse. Co.
McArty Storage Co.

CHICAGO
Anchor Storage Co.
C & A Terminal Warehouse Co.
Central Storage & Forwarding Co.
Crooks Terminal Warehouses
Currier-Lee Warehouse Co.
Dietrich Warehousing Co.
Empire Warehouses, Inc.
Goold Storage Co.
Griswold-Walker-Bateman Co.
Herrmann Warehouse Co.
Illinois Warehouse Co.
Kel-Mer Warehouse Company
E. E. Kendall Company
Edward Lasham Co.
Loop River & Rail Terminal Warehouse
Midland Warehouse & Transfer Co.
Mitchell-Jackson, Inc.
North Central Terminals Co.
North Pier Terminals Co.
Ontario Warehouse Co.
Orleans-Ontario Warehouse
Producers Warehouse Co.
Railway Terminal & Warehouse Co.

ILLINOIS (Continued)

DECATUR
Decatur Warehouse Co.

EAST ST. LOUIS
McMahon Transfer Co.
Mississippi Avenue Warehouses

ELGIN
Elgin Storage & Transfer Co.

JACKSONVILLE
Jacksonville Transfer & Stge. Co., Inc.

JOLIET
Joliet Warehouse & Transfer Co.

KANKAKEE
Belt Route, Warehouse & Stge. Co.

KEWANEE
Mayhew & Wedge

MOLINE
Crandall Transfer & Whse. Co.

OTTAWA
Scherer Bros. Transfer & Stge., Inc.

PANA
Roley Bros. Transfer Co.

PEKIN
Kriegsman Transfer Co.

PEORIA
Federal Warehouse Co.

PERU
H. J. Tobler Transfer Line

PRINCETON

Virginia-Carolina Storage Corp.
West Storage Co.

PETERSBURG
Petersburg Bonded Warehouse Corp.

RICHMOND
Terminal Storage Corp.
Virginia Bonded Whse. Corp.

Elk Storage Warehouse Co.
Nelson Transfer & Storage Co.

CLARKSBURG
Central Storage Co.

HUNTINGTON
Maier Sales & Storage Co.

WHEELING
Union Warehouse Holding Co.

REGION 4

ILLINOIS

AURORA
Martin Transfer & Storage Co., Inc.
Valentine Transfer & Storage Co.

BELLEVILLE
W. L. Batdorf & Co.
F. J. Hessler & Sons, Inc.

BLOOMINGTON
The Johnson Transfer & Fuel Co.

CAIRO
Cairo River & Rail Warehouses
Halliday Warehouse Co.
Pink & Co., Inc.

CHAMPAIGN
Champaign Stge. & Whse. Co.
McArty Storage Co.

CHICAGO
Anchor Storage Co.
C & A Terminal Warehouse Co.
Central Storage & Forwarding Co.
Crooks Terminal Warehouses
Currier-Lee Warehouse Co.
Dietrich Warehousing Co.
Empire Warehouses, Inc.
Gould Storage Co.
Griswold-Walker-Bateman Co.
Herrmann Warehouse Co.
Illinois Warehouse Co.
Kel-Mer Warehouse Company
E. E. Kendall Company
Edward Lasham Co.
Loop River & Rail Terminal Warehouse
Midland Warehouse & Transfer Co.
Mitchell-Jackson, Inc.
North Central Terminals Co.
North Pier Terminals Co.
Ontario Warehouse Co.
Orleans-Ontario Warehouse
Producers Warehouse Co.
Railway Terminal & Warehouse Co.
Republic Warehouse Company
Seng Terminal Warehouse Co.
Soo Terminal Warehouse
South End Warehouse Co.
Sykes Terminal Warehouse
Thompson Terminal Warehouses, Inc.
Tooker Storage & Forwarding Co.
Twin City Trading Co.
Wakem & McLaughlin, Inc.
Western Warehousing Co.

DANVILLE
Danville Transfer & Storage Co.

ILLINOIS (Continued)

DECATUR
Decatur Warehouse Co.

EAST ST. LOUIS
McMahon Transfer Co.
Mississippi Avenue Warehouses

ELGIN
Elgin Storage & Transfer Co.

JACKSONVILLE
Jacksonville Transfer & Stge. Co., Inc.

JOLIET
Joilet Warehouse & Transfer Co.

KANKAKEE
Belt Route, Warehouse & Stge. Co.

KEWANEE
Mayhew & Wedge

MOLINE
Crandall Transfer & Whse. Co.

OTTAWA
Scherer Bros. Transfer & Stge., Inc.

PANA
Roley Bros. Transfer Co.

PEKIN
Kriegsman Transfer Co.

PEORIA
Federal Warehouse Co.

PERU
H. J. Tobler Transfer Line

PRINCETON
Larson Seed House

QUINCY
King Transfer Line

ROCKFORD
Bartlett Storage Warehouse
Lawson Transfer & Storage
Richards Storage & Van Company

ROCK ISLAND
Rock Island Transfer & Storage Co.
Voss Bros. Express & Storage

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ILLINOIS (Continued).

SPRINGFIELD
Wm. H. Edwards
Hillier Storage Co.
Merchants Transfer & Storage Co.
Weidlocher & Sons, Inc.

STERLING
John Clayton Batteiger

STREATOR
Johnson Transfer & Storage Co.

TAYLORVILLE
H. R. Rinker

WAUKEGAN
Waukegan Terminal Whse. Co.

INDIANA

EVANSVILLE
Broker Warehouse Co., Inc.
Evansville Warehouse Co.
Lex Terminal Warehouse Co.
Mead Johnson Terminal Corp.
The Terminal Warehouse Co., Inc.

FORT WAYNE
Fort Wayne Storage Co.
Pettit's Storage Warehouse Co.

GARY
Gary Warehouse Co.

HAMMOND
Chapin & Co.
Great Lakes Warehouse Corp.

INDIANAPOLIS
Central Public Warehouse Co.
Central Transfer & Storage Co., Inc.
Henry Coburn Storage & Whse. Co.
Indiana Terminal & Refrigerating Co.
The Lauter Warehouse Co.
Mann Transfer & Storage Co., Inc.
Strohm Warehouse & Cartage Co.
Tripp Warehouse Co.
Warehouse Distributing Corp.

MUNCIE
Delaware Trucking Co., Inc.

NEW ALBANY
Denny Motor Transfer Co.

RICHMOND
Forest Monger

SOUTH BEND
Grand Trunk Terminal Warehouse Co.
National Storage Warehouse Co.
Ullery Storage Warehouse Co.

MICHIGAN

BAY CITY
Riverside Truck & Storage Co.
P. Van Haaren & Sons Storage Co., Inc.

DETROIT
Central Detroit Warehouse Co.

MICHIGAN (Continued)

GRAND RAPIDS
Columbian Storage & Transfer Co.
Kent Storage Co.
Merchants Storage & Transfer Co., Inc.
Richards Storage Corporation
Star Transfer Line

LANSING
Fireproof Storage Co.

MUSKEGON
Richards Storage Corp.

PORT HURON
United Trucking Service, Inc.

SOUTH HAVEN
South Haven Term. Co., Inc.

OHIO

ASHTABULA
Ashtabula Fireproof Storage Co., Inc.

CANTON
Canton Storage, Inc.
Cummins Storage Co.
McKinley Storage & Transfer Co.
W. H. Schneider Storage Co.

CINCINNATI
Baltimore & Ohio Warehouse Co.
The Cincinnati Ice Mfg. & Cold Stge. Co.
Cincinnati Merchandise Warehouses, Inc.
Cincinnati Storage & Whse. Co., Inc.
Cincinnati Terminal Warehouses, Inc.
The Cincinnati Transfer Co.
Front & Butler Warehouses, Inc.
Meinch Drayage Co.
The Wallace Transfer & Forwarding Co.

CLEVELAND
Central Storage Warehouse Co.
The Cleveland Storage Co.
Consolidated Cartage & Storage Co.
The Curtis Bros. Transfer Co.
The Distr. Term. & Cold Storage Co.
The East 45th St. Warehouse Co.
William Edwards Co.
Greeley-General Warehouse Co.
Greeley Terminal Co.
Lederer Terminal Warehouse Co.
National Terminals Corp.
The Ohio Terminal Co.
Security Warehouse & Cartage, Inc.
The Sheriff St. Mkt. & Storage Co.
The Valley Warehouse Co.

COLUMBUS
Columbus Terminal Warehouse Co.
Columbus Warehouses, Inc.
The Kutschbach-McNally Co.
The Merchandise Warehouse Co.
The Neilston Warehouse Co.

DAYTON
Cincinnati Storage & Warehouse Co., Inc.

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H. R. Rinker

WAUKEGAN
Waukegan Terminal Whse. Co.

INDIANA

EVANSVILLE
Broker Warehouse Co., Inc.
Evansville Warehouse Co.
Lex Terminal Warehouse Co.
Mead Johnson Terminal Corp.
The Terminal Warehouse Co., Inc.

FORT WAYNE
Fort Wayne Storage Co.
Pettit's Storage Warehouse Co.

GARY
Gary Warehouse Co.

HAMMOND
Chapin & Co.
Great Lakes Warehouse Corp.

INDIANAPOLIS
Central Public Warehouse Co.
Central Transfer & Storage Co., Inc.
Henry Coburn Storage & Whse. Co.
Indiana Terminal & Refrigerating Co.
The Lauter Warehouse Co.
Mann Transfer & Storage Co., Inc.
Strohm Warehouse & Cartage Co.
Tripp Warehouse Co.
Warehouse Distributing Corp.

MUNCIE
Delaware Trucking Co., Inc.

NEW ALBANY
Denny Motor Transfer Co.

RICHMOND
Forest Monger

SOUTH BEND
Grand Trunk Terminal Warehouse Co.
National Storage Warehouse Co.
Ullery Storage Warehouse Co.

MICHIGAN

BAY CITY
Riverside Truck & Storage Co.
P. Van Haaren & Sons Storage Co., Inc.

DETROIT
Central Detroit Warehouse Co.
Detroit Harbor Terminals, Inc.
Detroit Refrigerating Co.
Edgar's Sugar House, Inc.
Federal Warehouse Co.
Grand Trunk Ry. Terminal & Cold Stge. Co.
The John Henry & Schram Storage & Trucking Co.
Jefferson Terminal Warehouse
Riverside Storage & Cartage Co.
Superior Warehouse Co.
United States Warehouse Co.
Wayne Warehouse Company
G. B. Weaver & Co., Inc.

FLINT
Central Warehouse Co.

PORT HURON
United Trucking Service, Inc.

SOUTH HAVEN
South Haven Term. Co., Inc.

OHIO

ASHTABULA
Ashtabula Fireproof Storage Co., Inc.

CANTON
Canton Storage, Inc.
Cummins Storage Co.
McKinley Storage & Transfer Co.
W. H. Schneider Storage Co.

CINCINNATI
Baltimore & Ohio Warehouse Co.
The Cincinnati Ice Mfg. & Cold Stge. Co.
Cincinnati Merchandise Warehouses, Inc.
Cincinnati Storage & Whse. Co., Inc.
Cincinnati Terminal Warehouses, Inc.
The Cincinnati Transfer Co.
Front & Butler Warehouses, Inc.
Meinch Drayage Co.
The Wallace Transfer & Forwarding Co.

CLEVELAND
Central Storage Warehouse Co.
The Cleveland Storage Co.
Consolidated Cartage & Storage Co.
The Curtis Bros. Transfer Co.
The Distr. Term. & Cold Storage Co.
The East 45th St. Warehouse Co.
William Edwards Co.
Greeley-General Warehouse Co.
Greeley Terminal Co.
Lederer Terminal Warehouse Co.
National Terminals Corp.
The Ohio Terminal Co.
Security Warehouse & Cartage, Inc.
The Sheriff St. Mkt. & Storage Co.
The Valley Warehouse Co.

COLUMBUS
Columbus Terminal Warehouse Co.
Columbus Warehouses, Inc.
The Kutschbach-McNally Co.
The Merchandise Warehouse Co.
The Neilston Warehouse Co.

DAYTON
Cincinnati Storage & Warehouse Co., Inc.
Union Storage Co.

HAMILTON
Cincinnati Storage & Warehouse Co., Inc.

LIMA
Lima Truck & Storage Co.

MIDDLETOWN
Cincinnati Storage & Warehouse Co., Inc.

SPRINGFIELD
Wagner Warehouse Corporation

STEUBENVILLE
Jefferson Storage Warehouse Co.

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OHIO (Continued)

TOLEDO
- Brundage Bros. Co.
- The Sam Davis Co.
- Great Lakes Terminal Whse. Co. of Toledo
- Habor Terminals, Inc.
- Merchants & Manufacturers Warehouse Co.
- Moreton Storage Co.
- National Terminals Corp.
- Toledo Terminal Warehouse Co.

YOUNGSTOWN
- Fisher-Gilder Cartage & Storage Co.
- Youngstown-Erie Terminal Co.

WISCONSIN

EAU CLAIRE
- Sioux Storage & Forwarding Co.

GREEN BAY
- Brown County Warehouses, Inc.
- Leicht Transfer & Storage Co.
- Jules Peters Transfer & Storage Co.

WISCONSIN (Continued)

LA CROSSE
- Gateway City Trans. & Stge. Co.
- La Crosse Terminal Warehouse Co.

MILWAUKEE
- Atlas Storage Co.
- Badger Storage Warehouse Co.
- Barclay Warehouse Co.
- Barry Transfer & Storage Co., Inc.
- Carlson Storage Co.
- Courteen Seed Co.
- Hansen Storage Co.
- Lincoln Fireproof Warehouse Co.
- Milwaukee Transfer & Storage Co.
- National Terminals Corp.
- National Warehouse Corp.
- Roegge Storage & Delivery Co.
- L. Teweles Seed Co.

OSHKOSH
- Oshkosh Storage Co.

RACINE
- Ross Moving & Storage Co.

SHEBOYGAN
- Sheboygan Furniture Forwarding Co.

REGION 5

SUPERIOR, WISCONSIN

SUPERIOR
- Hill Warehouse & Tracking Co.
- Superior and Duluth Transfer Co.

MINNESOTA

DULUTH
- Duluth Van & Storage Co.
- McDougall Terminal & Cold Storage Co.
- Northern Cold Storage & Warehouse Co.
- Security Storage & Van Co.

MANKATO
- Jessup Transfer & Storage Co.

MINNEAPOLIS
- Anchor Warehouse, Inc.
- Cameron Transfer & Storage Co.
- Colonial Warehouses, Inc.
- Great Northern Warehouse Co., Inc.
- Kedney Warehouse Co.
- Merchants Cold Storage Co.
- Minneapolis Terminal Warehouse Co.
- Northwest Warehousing Co.
- Northwestern Terminal Co.
- Security Warehouse Co.
- Sterling Cartage Company
- Twin City Trading Co.
- Widholm Transfer & Storage Co.

MOORHEAD
- Moorhead Storage & Transfer Co.

ST. PAUL
- Central Warehouse Co.
- Fidelity Storage & Transfer Co.
- Kedney Warehouse Co.
- St. Paul Terminal Warehouse Co.

MONTANA (Continued)

BUTTE
- Bertoglio & McTaggart Stge. Co.
- Christie Transfer & Storage Co.
- Jones Storage & Transfer Co., Inc.

GREAT FALLS
- Great Falls Transfer & Storage Co.

HELENA
- Diamond "C" Transfer

MISSOULA
- Reely's Storage & Transfer

NORTH DAKOTA

BISMARCK
- Wachter Transfer Corp.

FARGO
- Adams Transfer & Storage
- Union Storage & Transfer Co.

GRAND FORKS
- Kedney Warehouse Co. of North Dakota

JAMESTOWN
- Jamestown Warehouse Co.

SOUTH DAKOTA

ABERDEEN
- Jobbers Warehouse, Ward-Owsley Company, Inc.

RAPID CITY

REGION 6

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IOWA

AMES
Dragoun Transfer & Storage Co.

BOONE
Wilson's Transfer & Storage

CEDAR RAPIDS
American Transfer & Storage Co.
Calder's Van & Storage Co., Inc.
P. J. Ernst Auto Storage
Cedar Rapids Transfer & Storage Co.
Lynch Transfer Co., Inc.
Ben H. Witwer

CLINTON
Carstensen Transfer & Storage

COUNCIL BLUFFS
Ford Bros. Van & Storage Co.

DAVENPORT
Ewert & Richter Exp. & Stge. Co.
Merchants Transfer & Storage Co.
Roederer Transfer & Storage Co.

DES MOINES
Blue Line Storage Co.
Hawkeye Transfer Co., Inc.
Merchants Transfer & Storage Co.
Ware Transfer & Storage Co.
White Line Transfer & Storage Co.

DUBUQUE
The Martin-Streiau Co.

FORT DODGE
Brady Transfer & Storage Co.
White Transfer & Storage Co.

MASON CITY
Cadwell Transfer & Storage Co.

SHELDON
McKay & Krahling

SIOUX CITY
Bekins Merchandise Storage
Dougherty Storage & Van Co.
Sioux City Storage & Forwarding Co.

KANSAS

DODGE CITY
Dodge City Transfer & Storage Company
Woolwine's Transfer & Storage Co.

EMPORIA
L. R. Bailey Transfer & Storage Co.

KANSAS CITY
Grandview Club Trans. & Storage Co.

PARSONS
Parsons Cold Storage Co.

PITTSBURG
Merchants Transfer & Warehouse Co.
Pittsburg Transfer & Storage Co.

MISSOURI

CARTHAGE
Carthage Transfer & Storage Co.

JOPLIN
Joplin Transfer & Storage Co.
Tonnies Transfer & Storage Co.

KANSAS CITY
Abner Hood Chemical Co.
A-B-C Fireproof Warehouse Co.
Adams Transfer & Storage Co.
Central Storage Co.
Crooks Terminal Warehouses
Empire Storage & Ice Co.
Evans Transfer & Stge. Co.
Kansas City Power & Light Co.
Liberty Storage Co.
W. E. Murray Transfer & Storage Co.
The Mutual Transfer Co.
The Only Way Transfer & Warehouse Co.
Radial Warehouse Co.
Rairdon Transfer & Warehouse Co.
The Rhodes Implement Co.
H. H. Smith Storage Co.
United Warehouse Co.
Walnut Storage & Distributing Co.

ST. JOSEPH
Brown Transfer & Storage Co.
St. Joseph Transfer & Stge. Co.
Terminal Warehouses of St. Joseph, Inc.

ST. LOUIS
Arrow Storage Co., Inc.
Booth Cold Storage Co.
Broadway Terminal Warehouse Corp.
Central Terminal Co.
Columbia Terminal Co.
Grocer's Warehouse Company.
Howland Warehouse Company
S. N. Long Warehouse Co.
McPheeter's Warehouse Co.
Missouri Warehousing Co.
Rutger St. Warehouse, Inc.
St. Louis Distributing Whse. Co.
St. Louis Mart, Inc.
St. Louis Terminal Warehouse Co.
Talbot Terminal Warehouse Co.
Tyler Warehouse Co.

SPRINGFIELD
Finkbiner Transfer & Storage Co.
Springfield Warehouse & Transfer Co.

NEBRASKA

BEATRICE
A. Palmer Company

COLUMBUS
Columbus Fuel & Storage Company

FREMONT
Union Transfer Co.

HASTINGS
Borley Storage & Transfer Co., Inc.

LINCOLN

Calder's Van & Storage Co., Inc.
P. J. Ernst Auto Storage
Cedar Rapids Transfer & Storage Co.
Lynch Transfer Co., Inc.
Ben H. Witwer

CLINTON
Carstensen Transfer & Storage

COUNCIL BLUFFS
Ford Bros. Van & Storage Co.

DAVENPORT
Ewert & Richter Exp. & Stge. Co.
Merchants Transfer & Storage Co.
Roederer Transfer & Storage Co.

DES MOINES
Blue Line Storage Co.
Hawkeye Transfer Co., Inc.
Merchants Transfer & Storage Co.
Ware Transfer & Storage Co.
White Line Transfer & Storage Co.

DUBUQUE
The Martin-Strelau Co.

FORT DODGE
Brady Transfer & Storage Co.
White Transfer & Storage Co.

MASON CITY
Cadwell Transfer & Storage Co.

SHELDON
McKay & Krahling

SIOUX CITY
Bekins Merchandise Storage
Dougherty Storage & Van Co.
Sioux City Storage & Forwarding Co.

KANSAS

DODGE CITY
Dodge City Transfer & Storage Company
Woolwine's Transfer & Storage Co.

EMPORIA
L. R. Bailey Transfer & Storage Co.

KANSAS CITY
Grandview Club Trans. & Storage Co.

PARSONS
Parsons Cold Storage Co.

PITTSBURG
Merchants Transfer & Warehouse Co.
Pittsburg Transfer & Storage Co.

SALINA
Stevenson Transfer Co.

TOPEKA
Kansas Transfer & Storage Co.
Topeka Transfer & Storage Co.

WICHITA
Broker's Office & Warehouse Co.
The Cassell Transfer & Storage Co.
Merchants Transfer & Whse. Co., Inc.
Peoples Transfer & Storage Co.
United Warehouse Co.
Wichita Yellow Cab Co., Inc.

Abner Hood Chemical Co.
A-R-C Fireproof Warehouse Co.
Adams Transfer & Storage Co.
Central Storage Co.
Crooks Terminal Warehouses
Empire Storage & Ice Co.
Evans Transfer & Stge. Co.
Kansas City Power & Light Co.
Liberty Storage Co.
W. E. Murray Transfer & Storage Co.
The Mutual Transfer Co.
The Only Way Transfer & Warehouse Co.
Radial Warehouse Co.
Rairdon Transfer & Warehouse Co.
The Rhodes Implement Co.
H. H. Smith Storage Co.
United Warehouse Co.
Walnut Storage & Distributing Co.

ST. JOSEPH
Brown Transfer & Storage Co.
St. Joseph Transfer & Stge. Co.
Terminal Warehouses of St. Joseph, Inc.

ST. LOUIS
Arrow Storage Co., Inc.
Booth Cold Storage Co.
Broadway Terminal Warehouse Corp.
Central Terminal Co.
Columbia Terminal Co.
Grocer's Warehouse Company
Howland Warehouse Company
S. N. Long Warehouse Co.
McPheeter's Warehouse Co.
Missouri Warehousing Co.
Rutger St. Warehouse, Inc.
St. Louis Distributing Whse. Co.
St. Louis Mart, Inc.
St. Louis Terminal Warehouse Co.
Talbot Terminal Warehouse Co.
Tyler Warehouse Co.

SPRINGFIELD
Finkbiner Transfer & Storage Co.
Springfield Warehouse & Transfer Co.

NEBRASKA

BEATRICE
A. Palmer Company

COLUMBUS
Columbus Fuel & Storage Company

FREMONT
Union Trapsfer Co.

HASTINGS
Borley Storage & Transfer Co., Inc.

LINCOLN
Star Van & Storage Co.
Sullivan Transfer & Storage Co.
Union Terminal Warehouse Co.

OMAHA
Bekins Van & Storage Co.
Bushman Warehouse & Storage Co.
Central Storage & Van Co.
Fidelity Storage & Van Co., Inc.
Ford Bros. Van & Storage Co.
Gordon Storage Warehouses, Inc.
Knowles Storage & Moving Co.
Pacific Storage & Warehouse Co.
The Terminal Warehouse Co.
Trimble Brothers

REGION 7

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ARKANSAS

FORT SMITH
Arkansas Warehouse Co.
O. K. Transfer & Storage Co.

LITTLE ROCK
Commercial Warehouse Co.
Merchants Transfer & Warehouse Co.
Terminal Warehouse Co.

TEXARKANA
Hunter Transfer & Storage Co.

LOUISIANA

ALEXANDRIA
Carnahan's Transfer & Storage Co.
Trousdale, Wright & Keller, Inc.

LAKE CHARLES
United Whse. & Forwarding Co., Inc.

MONROE
Faulk-Collier Bonded Warehouses, Inc.
Monroe Transfer & Whse. Co., Inc.
Trousdale & Wright, Inc.

NEW ORLEANS
Acme Warehouses
Appalachian Warehouses
Army Base Unit No. 2, Douglas Shipside Storage Corp.
Bienville Warehouse Corporation
Commercial Terminal Warehouse Co.
Gottam Block Warehouse
Dietrich & Wiltz, Inc.
Douglas Public Service Corp.
Douglas Shipside Storage Corp.
Importers Bonded Warehouse
Independent Warehouse Co., Inc.
Kentucky Coffee Warehouse Co.
Maloney Trucking & Storage, Inc.
Orleans Warehouses Corp., Inc.
Pelican C. S. & Warehousing Co., Ltd.
Rebecca-Fabacher, Inc.
Riverside Warehouses, Inc.
Shipside Storage Co., Inc.
Standard Warehouse Co., Inc.

SHREVEPORT
Caddo Transfer & Warehouse Co., Inc.
Herrin Transfer & Warehouse Co., Inc.
McGee Warehouse & Storage Co.
O. K. Storage & Van Co., Inc.
Terminal Warehouse & Trf. Co., Inc.

NEW MEXICO

ALBUQUERQUE
Shufflebarger Transfer & Storage Co., Inc.
Springer Transfer Co., Inc.

OKLAHOMA

ADA
Couch Transfer & Storage Co.

OKLAHOMA (Continued)

OKLAHOMA CITY
Commercial Warehouse Co.
O. K. Transfer & Storage Co.
Oklahoma Bonded Warehouse
The Public Warehouse Co.
Red Ball, Inc.
Reliable Van & Warehouse Co.

TULSA
Federal Storage & Van Co.
Joe Hodges Fireproof Warehouses
Nichols Transfer & Storage Co.
Tulsa Terminal Storage & Transfer Co.

TEXAS

ABILENE
Abilene Storage Co.
J. D. Moore Transfer & Storage
W. T. Wilson Transfer & Storage Co.

AMARILLO
Amarillo Warehouse Co.
American Warehouse & Storage Co.
Armstrong Transfer & Storage Co., Inc.
Bishop Warehouse & Storage Co.
M. & L. Transfer & Storage Co.
McKnight Transfer, Livery & Sales Co.

AUSTIN
Merchants Transfer & Storage Co.
Patton's, Inc. Operating as Patton Transfer Co.
Scobey Fireproof Storage Co.

BEAUMONT
Heisig Storage & Transfer Co.
Terminal Warehouse & Storage Co.

BROWNSVILLE
Jones Transfer & Storage Co.

CORPUS CHRISTI
Corpus Christi Transfer Co., Inc.
Corpus Christi Whse. & Storage Co.
Crocker Transfer & Storage Co.
Lone Star Warehouse & Storage
State Bonded Warehouse Co.

CORSICANA
Corsicana-Trinity Warehouse Co.

DALLAS
American Transfer & Storage Co.
Bityon-O'Keefe Fireproof Storage Co.
Dallas Transfer & Terminal Whse. Co.
Dallas-Trinity Warehouse Co.
Gillette Transfer & Storage Co.
Interstate Fireproof Stge. & Transfer Co.
Koon-McNatt Storage & Transfer Co.
Merchants Cold Storage Co.
Morgan Warehouse & Commercial Co.
Preston Warehouse
Service Warehouse Co.
Shannon Warehouse Service
The Shippers Warehouse Co.
Sproles Transfer & Storage Co.

EDINBURG
Jones Transfer & Storage Co.

EL PASO
Achteberg Warehouse Co.
El Paso Fireproof Storage Co.

LOUISIANA

ALEXANDRIA
Carnahan's Transfer & Storage Co.
Trousdale, Wright & Keller, Inc.

LAKE CHARLES
United Whse. & Forwarding Co., Inc.

MONROE
Faulk-Collier Bonded Warehouses, Inc.
Monroe Transfer & Whse. Co., Inc.
Trousdale & Wright, Inc.

NEW ORLEANS
Acme Warehouses
Appalachian Warehouses
Army Base Unit No. 2, Douglas Shipside Storage Corp.
Bienville Warehouse Corporation
Commercial Terminal Warehouse Co.
Cottam Block Warehouse
Dietrich & Wiltz, Inc.
Douglas Public Service Corp.
Douglas Shipside Storage Corp.
Importers Bonded Warehouse
Independent Warehouse Co., Inc.
Kentucky Coffee Warehouse Co.
Maloney Trucking & Storage, Inc.
Orleans Warehouses Corp., Inc.
Pelican C. S. & Warehousing Co., Ltd.
Rebecca-Fabacher, Inc.
Riverside Warehouses, Inc.
Shipside Storage Co., Inc.
Standard Warehouse Co., Inc.

SHREVEPORT
Caddo Transfer & Warehouse Co., Inc.
Herrin Transfer & Warehouse Co., Inc.
McGee Warehouse & Storage Co.
O. K. Storage & Van Co., Inc.
Terminal Warehouse & Trf. Co., Inc.

NEW MEXICO

ALBUQUERQUE
Shufflebarger Transfer & Storage Co., Inc.
Springer Transfer Co., Inc.

OKLAHOMA

ADA
Couch Transfer & Storage Co.

CHICKASHA
Painter Transfer & Storage Co.

CLINTON
Clinton Transfer & Storage Co.

GUTHRIE
Fairfield Transfer

MUSKOGEE
Muskogee Transfer & Storage Co.

[illegible] Transfer & Storage Co.
Tulsa Terminal Storage & Transfer Co.

TEXAS

ABILENE
Abilene Storage Co.
J. D. Moore Transfer & Storage
W. T. Wilson Transfer & Storage Co.

AMARILLO
Amarillo Warehouse Co.
American Warehouse & Storage Co.
Armstrong Transfer & Storage Co., Inc.
Bishop Warehouse & Storage Co.
M. & L. Transfer & Storage Co.
McKnight Transfer, Livery & Sales Co.

AUSTIN
Merchants Transfer & Storage Co.
Patton's, Inc. Operating as Patton Transfer Co.
Scobey Fireproof Storage Co.

BEAUMONT
Heisig Storage & Transfer Co.
Terminal Warehouse & Storage Co.

BROWNSVILLE
Jones Transfer & Storage Co.

CORPUS CHRISTI
Corpus Christi Transfer Co., Inc.
Corpus Christi Whse. & Storage Co.
Crocker Transfer & Storage Co.
Lone Star Warehouse & Storage
State Bonded Warehouse Co.

CORSICANA
Corsicana-Trinity Warehouse Co.

DALLAS
American Transfer & Storage Co.
Binyon-O'Keefe Fireproof Storage Co.
Dallas Transfer & Terminal Whse. Co.
Dallas-Trinity Warehouse Co.
Gillette Transfer & Storage Co.
Interstate Fireproof Stge. & Transfer Co.
Koon-McNatt Storage & Transfer Co.
Merchants Cold Storage Co.
Morgan Warehouse & Commercial Co.
Preston Warehouse
Service Warehouse Co.
Shannon Warehouse Service
The Shippers Warehouse Co.
Sproles Transfer & Storage Co.

EDINBURG
Jones Transfer & Storage Co.

EL PASO
Achteberg Warehouse Co.
El Paso Fireproof Storage Co.
International Warehouse Co., Inc.
Charles G. Schnaibel
Security Fireproof Storage Co.

FORT WORTH
Binyon-O'Keefe Fireproof Storage Co.
Ft. Worth-Trinity Warehouse Co.
Fort Worth Warehouse & Storage Co.
Sproles Transfer & Storage Co.
O. K. Warehouse Co., Inc.
Texas & Pacific Terminal Whse. Co.

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TEXAS (Continued)

GALVESTON
Wiley & Nicholls Co.

HARLINGEN
Jones Transfer & Storage Co.

HOUSTON
American Bonded Warehouse Co.
Buffalo Warehouse Co.
Herrin Transfer & Warehouse Co.
Houston Central Warehouse Co., Inc.
Houston Port Warehouse Co.
Houston Terminal Whse. & Cold Stge. Co.
E. A. Hudson Transfer & Warehouse Co., Inc.
Manchester Terminal Corp.
Patrick Transfer & Storage Co.
Port Warehouse & Forwarding Co.
Texas Port City Stge. & Trans. Co., Inc.
Texas Warehouse Co.
The Tidewater Warehouse Co., Inc.
Union Transfer & Storage Co.
Universal Terminal Warehouse Co.
Wald Transfer & Storage Co.
Westheimer Transfer & Storage Co.

LUBBOCK
Armstrong Transfer & Storage Co., Inc.
Western Transfer & Storage Co.

McALLEN
McAllen Transfer & Storage Co.
Jones Transfer & Storage Co.

TEXAS (Continued)

PARIS
Paris Transfer & Storage Co.

PLAINVIEW
Plainview Warehouse & Storage Co.

SAN ANGELO
San Angelo Transfer Co.

SAN ANTONIO
Central Warehouse & Storage Co., Inc.
Linnartz & Frey, Inc.
Merchants Transfer & Storage Co.
Muegge-Jenull Warehouse Co.
Scobey Fireproof Storage Co.
Security Bonded Warehousing Co.
Southern Transfer Co., Inc.
State Bonded Warehouse Co.

SWEETWATER
Sweetwater Transfer Co.

TYLER
Tarry Transfer & Storage Company
Tyler Warehouse & Transfer Co.

WACO
Sproles Transfer & Storage Co.
Texas Fireproof Storage Co.

WICHITA FALLS
Sproles Transfer & Warehouse Co.
Tarry Warehouse & Storage Co., Inc.

REGION 8

COLORADO

ALAMOSA
W. A. Jones Transfer Co.

COLORADO SPRINGS
The Pikes Peak Warehousing Co.
The Wandell & Lowe Trf. & Stge. Co.

DENVER
Bankers Warehouse Co.
Colorado Warehouse Co.
Duffy Storage & Moving Co.
Kennicott Patterson Warehouse Corp.
Morgan Transfer & Storage Co.
Morris Warehouse Co.
North Denver Transfer & Storage Co.
Rocky Mountain Warehouse Co.
Security Storage Co., Inc.
United States Transfer & Storage Warehouse Co.
Weicker Transfer & Storage Co.

GRAND JUNCTION
J. W. Milne Transfer & Storage
E. W. Terrill Transfer & Storage

COLORADO (Continued)

PUEBLO
Burch Warehouse & Transfer Co.
J. W. Pearson Company

TRINIDAD
Pople Transfer & Storage Co.

UTAH

OGDEN
Interstate Terminal Warehouse Co.
Western Gateway Storage Co.

SALT LAKE CITY
Central Warehouse
Hadley Transfer & Storage Co.
Jennings-Cornwall Warehouse Co.
M. A. Keyser Fireproof Storage Co.
Korns Warehouse Co.
Redman Van & Storage Co.
Security Storage & Commission Co.

WYOMING

CHEYENNE
Barlow Bros. Transfer
The Cheyenne Transfer & Storage Co.

REGION 9

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Port Warehouse & Forwarding Co.
Texas Port City Stge. & Trans. Co., Inc.
Texas Warehouse Co.
The Tidewater Warehouse Co., Inc.
Union Transfer & Storage Co.
Universal Terminal Warehouse Co.
Wald Transfer & Storage Co.
Westheimer Transfer & Storage Co.

LUBBOCK
Armstrong Transfer & Storage Co., Inc.
Western Transfer & Storage Co.

McALLEN
McAllen Transfer & Storage Co.
Jones Transfer & Storage Co.

SWEETWATER
Sweetwater Transfer Co.

TYLER
Tarry Transfer & Storage Company
Tyler Warehouse & Transfer Co.

WACO
Sproles Transfer & Storage Co.
Texas Fireproof Storage Co.

WICHITA FALLS
Sproles Transfer & Warehouse Co.
Turry Warehouse & Storage Co.; Inc.

REGION 8

COLORADO

ALAMOSA
W. A. Jones Transfer Co.

COLORADO SPRINGS
The Pikes Peak Warehousing Co.
The Wandell & Lowe Trf. & Stge. Co.

DENVER
Bankers Warehouse Co.
Colorado Warehouse Co.
Duffy Storage & Moving Co.
Kennicott Patterson Warehouse Corp.
Morgan Transfer & Storage Co.
Morris Warehouse Co.
North Denver Transfer & Storage Co.
Rocky Mountain Warehouse Co.
Security Storage Co., Inc.
United States Transfer & Storage Warehouse Co.
Weicker Transfer & Storage Co.

GRAND JUNCTION
J. W. Milne Transfer & Storage
E. W. Terrill Transfer & Storage

COLORADO (Continued)

PUEBLO
Burch Warehouse & Transfer Co.
J. W. Pearson Company

TRINIDAD
Pople Transfer & Storage Co.

UTAH

OGDEN
Interstate Terminal Warehouse Co.
Western Gateway Storage Co.

SALT LAKE CITY
Central Warehouse
Hadley Transfer & Storage Co.
Jennings-Cornwall Warehouse Co.
M. A. Keyser Fireproof Storage Co.
Korns Warehouse Co.
Redman Van & Storage Co.
Security Storage & Commission Co.

WYOMING

CHEYENNE
Barlow Bros. Transfer
The Cheyenne Transfer & Storage Co.

REGION 9

IDAHO

BOISE
Compton Transfer and Storage Company
Idaho Distributors, Inc.
Pensley Transfer & Storage Co.

LEWISTON
Eagle Transfer & Storage Co.
Star Dray & Transfer Co.

POCATELLO
Garrett Transfer & Storage Co., Inc.
Jennings-Cornwall Warehouses, Inc.

TWIN FALLS
Garrett Transfer & Storage Co., Inc.

OREGON

EUGENE
Pacific Transfer & Storage Co.

OREGON (Continued)

PENDLETON
Penland Bros. Transfer Co.

PORTLAND
Alert Transfer & Storage Co.
Baggage & Omnibus Transfer Co.
Colonial Warehouse & Transfer Co.
Helser Bros. Transfer Co.
Holman Transfer Co.
Hunt Transfer Co., Inc.
Lyon Van & Storage Co.
Manning Warehouse & Transfer Co.
Northwestern Transfer Co.
Olsen Roe Transfer Co.
Oregon Transfer Company
Package Delivery Co.
Pihl Transfer & Storage Co.
Portland Auto Delivery Co.
Rapid Transfer & Storage Co.
Rudie Wilhelm Warehouse Co., Inc.

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OREGON (Continued)

ROSEBURG
H. S. French Transfer & Storage Co.

WASHINGTON

ABERDEEN
A. A. Star Transfer Co.

SEATTLE
A. B. C. Storage Co.
American Warehouse Co.
Christie-Lambert Van & Storage Co., Inc.
City Transfer & Storage Co.
Eyres Transfer & Warehouse Co.
Fortune Transfer Company
Hullin Transfer Co.
Merchants Transfer & Storage Co.
Olympic Warehouse & Cold Storage Co.
Owl Transfer & Storage Co.
Reliable Transfer & Storage Co.
Seattle Transfer & Storage Co.
System Transfer & Storage Co.

WASHINGTON (Continued)

SEATTLE (Continued)
Taylor-Edwards Whse. & Transfer Co., Inc.
United Warehouse Co.
Winn & Russell, Inc.

SPOKANE
Beardmore Transfer Line Corp.
Cater Transfer & Storage Co.
Goodwin Transfer & Storage Co.
Grimmer Storage & Truck Line, Inc.
McAllister Warehouse Co., Inc.
National Storage & Warehouse Co.
Pacific Transfer Co.
Riverside Warehouse
Spokane Transfer & Storage Co.

TACOMA
Pacific Storage Whse. & Distr. Co., Inc.
Star Commercial Moving & Storage Co.
Tacoma Moving & Storage Co.

WENATCHEE
Arrow Transfer & Storage Co.

REGION 10

ARIZONA

PHOENIX
Arrow Van & Storage Co.
Chambers Transfer & Storage Co.
Lightning Delivery Co.

TUCSON
Tucson Warehouse & Transfer Co.

CALIFORNIA

FRESNO
State Center Warehouse & Cold Storage Co., Inc.
Terminal Warehouse Co.

LONG BEACH
City Transfer & Storage Co.
Pacific & Orient Dock

LOS ANGELES
American Warehouse
Bekins Van Lines, Inc.
Birch-Smith Storage Co.
California Warehouse Co.
H. G. Chaffee Warehouse Co.
Citizens Warehouse
Colyear's Van & Storage Co.
Cook-McFarland Co.
Davies Warehouse Co.
G. Eckdahl & Son Warehouse Co.
Jennings-Nibley Warehouse Co., Ltd.
Los Angeles Warehouse Co.
Metropolitan Warehouse Co.
Modern Warehouses, Inc.
Overland Terminal Warehouse Co.
Pacific Coast Terminal Warehouse Co.
Pacific Commercial Warehouses, Inc.
Pacific Transportation & Warehouse Co.
Seaboard Warehouse
Star Truck & Warehouse Co.

CALIFORNIA (Continued)

OAKLAND
The Haslett Warehouse Co.
Howard Terminal
Oakland Warehouse Terminal, Div. of Merchants Exp. & Draying Co.

SACRAMENTO
Haslett Warehouse Co.

SAN DIEGO
Lyon Van & Storage Co.

SAN FRANCISCO
A. B. C. Transfer & Storage Co.
Belshaw Warehouse Co.
Central Warehouse & Drayage Co.
J. A. Clark Draying Co., Ltd.
De Pue Warehouse Co.
Distributors Warehouse Co.
The Dodd Warehouses
Farnsworth & Ruggles
Haslett Warehouse Co.
Lawrence Warehouse Co.
North Point Dock Warehouses
San Francisco Warehouse Co.
Sea Wall U. S. Bonded Warehouse
South End Warehouse Co.
Souther Warehouse Company
Thompson Bros.
Charles Lee Tilden & Co.
Turner-Whittell Warehouses
Walkup Drayage & Warehouse Co.

SAN JOSE
James Transfer & Storage Co.
Security Warehouse & Cold Storage Co.

SAN PEDRO
Outer Harbor Dock & Wharf Co.

STOCKTON
Haslett Warehouse Co.

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Eyres Transfer & Warehouse Co.
Fortune Transfer Company
Hullin Transfer Co.
Merchants Transfer & Storage Co.
Olympic Warehouse & Cold Storage Co.
Owl Transfer & Storage Co.
Reliable Transfer & Storage Co.
Seattle Transfer & Storage Co.
System Transfer & Storage Co.

Spokane Transfer & Storage Co.

TACOMA
Pacific Storage Whse. & Distr. Co., Inc.
Star Commercial Moving & Storage Co.
Tacoma Moving & Storage Co.

WENATCHEE
Arrow Transfer & Storage Co.

REGION 10

ARIZONA

PHOENIX
Arrow Van & Storage Co.
Chambers Transfer & Storage Co.
Lightning Delivery Co.

TUCSON
Tucson Warehouse & Transfer Co.

CALIFORNIA

FRESNO
State Center Warehouse & Cold Storage Co., Inc.
Terminal Warehouse Co.

LONG BEACH
City Transfer & Storage Co.
Pacific & Orient Dock

LOS ANGELES
American Warehouse
Bekins Van Lines, Inc.
Birch-Smith Storage Co.
California Warehouse Co.
H. G. Chaffee Warehouse Co.
Citizens Warehouse
Colyear's Van & Storage Co.
Cook-McFarland Co.
Davies Warehouse Co.
G. Kekdahl & Son Warehouse Co.
Jennings-Nibley Warehouse Co., Ltd.
Los Angeles Warehouse Co.
Metropolitan Warehouse Co.
Modern Warehouses, Inc.
Overland Terminal Warehouse Co.
Pacific Coast Terminal Warehouse Co.
Pacific Commercial Warehouses, Inc.
Pacific Transportation & Warehouse Co.
Seaboard Warehouse
Star Truck & Warehouse Co.
Union Terminal Warehouse
Western Warehouse & Transfer Co.
Westland Warehouses, Inc.

LOS ANGELES HARBOR
City & Harbor Warehouse, Ltd.
Crescent Warehouse Co.
Wilmington Transfer & Storage Co.

CALIFORNIA (Continued)

OAKLAND
The Haslett Warehouse Co.
Howard Terminal
Oakland Warehouse Terminal, Div. of Merchants Exp. & Draying Co.

SACRAMENTO
Haslett Warehouse Co.

SAN DIEGO
Lyon Van & Storage Co.

SAN FRANCISCO
A. B. C. Transfer & Storage Co.
Belshaw Warehouse Co.
Central Warehouse & Drayage Co.
J. A. Clark Draying Co., Ltd.
De Pue Warehouse Co.
Distributors Warehouse Co.
The Dodd Warehouses
Farnsworth & Ruggles
Haslett Warehouse Co.
Lawrence Warehouse Co.
North Point Dock Warehouses
San Francisco Warehouse Co.
Sea Wall U. S. Bonded Warehouse
South End Warehouse Co.
Souther Warehouse Company
Thompson Bros.
Charles Lee Tilden & Co.
Turner-Whittell Warehouses
Walkup Drayage & Warehouse Co.

SAN JOSE
James Transfer & Storage Co.
Security Warehouse & Cold Storage Co.

SAN PEDRO
Outer Harbor Dock & Wharf Co.

STOCKTON
Haslett Warehouse Co.
Overland Transfer Co.

NEVADA

RENO
Nevada Transfer & Warehouse Co.

EXHIBIT C

NRA CODE

SUBSCRIBERS

TO

MERCHANDISE WAREHOUSING TRADE CODE

JANUARY 31, 1935

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REGION 1

CONNECTICUT

BRIDGEPORT
- Bridgeport Storage Warehouse Co.
- Edgerton & Sons, Incorporated
- Hartford Despatch & Warehouse Co.
- A. R. Pacelli & Sons
- The W. M. Terry Co., Inc.

DANBURY
- The Danbury Warehouse Co.

HARTFORD
- Bill Brothers Co.
- Boat Line Warehouse Co., Inc.
- Hartford Despatch & Warehouse Co.
- Hartford Flour Company, Inc.
- Whitaker & Bacon

MERIDEN
- H. T. Smith Express Co.

NEW HAVEN
- Carl Barone
- Davis Storage Co.
- Durham Storage Co.
- The Smedley Co.

NEW LONDON
- Connecticut Terminal Company, Inc.

NORWALK
- L. J. Reynolds & Son

TORRINGTON
- E. J. Kelley Co.

WATERBURY
- The Blakeslee Co.

MAINE

BANGOR
- McLaughlin Warehouse Co.

PORTLAND
- Atlantic Storage & Warehouse, Inc.
- Galt Block Warehouse Co.
- New England Cold Storage Co., Inc.
- The Twitchell Champlin Company

MASSACHUSETTS

BOSTON
- Atlas Terminal Stores, Inc.

MASSACHUSETTS (Continued)

BOSTON (Continued)
- Melcher Street Stores, Inc.
- Merchants Warehouse Co.
- Mills Transfer Company
- North Station Industrial Bldg., Inc.
- Oelrichs & Co.
- Piers Operating Company
- Service Warehouse Co.
- Standard Storage Company
- Wiggin Terminals, Inc.
- D. S. Woodberry Co.

SOUTH BOSTON
- Andrew Square Warehouse
- Fort Point Warehouse Co.

CAMBRIDGE
- Cambridge Terminal Warehouse Co.

EAST CAMBRIDGE
- Hoosac Storage & Warehouse Co.

FALL RIVER
- Belleville Warehouse Company
- Fall River Warehouse Co.
- Keogh Storage Co.
- Mackenzie & Winslow, Inc.
- Shellmound Warehouse Co.

HOLYOKE
- Holyoke Storage Co.
- Sheldon Transfer & Storage Co., Inc.

LAWRENCE
- Lawrence Storage Warehouse

LOWELL
- Atlantic States Whse. & Cold Stge. Corp.
- Lowell Public Warehouse Co., Inc.

LYNN
- Lynn Storage Warehouse Co.

NEW BEDFORD
- Belleville Warehouse Co.
- Central Warehouse
- Nauset Warehouse Co.
- New Bedford Public Warehouse Co.
- New Bedford Storage Whse. Co.
- Prospect Warehouse Co.
- Winslow-Mackenzie Co.

PEABODY

CONNECTICUT

BRIDGEPORT
- Bridgeport Storage Warehouse Co.
- Edgerton & Sons, Incorporated
- Hartford Despatch & Warehouse Co.
- A. R. Pacelli & Sons
- The W. M. Terry Co., Inc.

DANBURY
- The Danbury Warehouse Co.

HARTFORD
- Bill Brothers Co.
- Boat Line Warehouse Co., Inc.
- Hartford Despatch & Warehouse Co.
- Hartford Flour Company, Inc.
- Whitaker & Bacon

MERIDEN
- H. T. Smith Express Co.

NEW HAVEN
- Carl Barone
- Davis Storage Co.
- Durham Storage Co.
- The Smedley Co.

NEW LONDON
- Connecticut Terminal Company, Inc.

NORWALK
- L. J. Reynolds & Son

TORRINGTON
- E. J. Kelley Co.

WATERBURY
- The Blakeslee Co.

MAINE

BANGOR
- McLaughlin Warehouse Co.

PORTLAND
- Atlantic Storage & Warehouse, Inc.
- Galt Block Warehouse Co.
- New England Cold Storage Co., Inc.
- The Twitchell Champlin Company

MASSACHUSETTS

BOSTON
- Atlas Terminal Stores, Inc.
- Bankers Warehouse Co.
- Big Three, Inc.
- Boston Tidewater Terminal, Inc.
- Bowker Storage Company
- Central Warehouse Co.
- Central Wool Warehouse Corporation
- Congress Stores, Inc.
- Dexter Stores, Inc.
- Eldridge Baker Co. (Sleeper Storage Co.)
- Fargo Stores, Inc.
- Federal Warehouse, Inc.
- Fitz Warehouse & Distributing Co.
- General Warehouse & Distribution Company
- J. L. Kelso Co.
- Manufacturers' Warehouse Co.

MASSACHUSETTS (Continued)

BOSTON (Continued)
- Melcher Street Stores, Inc.
- Merchants Warehouse Co.
- Mills Transfer Company
- North Station Industrial Bldg., Inc.
- Oelrichs & Co.
- Piers Operating Company
- Service Warehouse Co.
- Standard Storage Company
- Wiggin Terminals, Inc.
- D. S. Woodberry Co.

SOUTH BOSTON
- Andrew Square Warehouse
- Fort Point Warehouse Co.

CAMBRIDGE
- Cambridge Terminal Warehouse Co.

EAST CAMBRIDGE
- Hoosac Storage & Warehouse Co.

FALL RIVER
- Belleville Warehouse Company
- Fall River Warehouse Co.
- Keogh Storage Co.
- Mackenzie & Winslow, Inc.
- Shellmound Warehouse Co.

HOLYOKE
- Holyoke Storage Co.
- Sheldon Transfer & Storage Co., Inc.

LAWRENCE
- Lawrence Storage Warehouse

LOWELL
- Atlantic States Whse. & Cold Stge. Corp.
- Lowell Public Warehouse Co., Inc.

LYNN
- Lynn Storage Warehouse Co.

NEW BEDFORD
- Belleville Warehouse Co.
- Central Warehouse
- Nauset Warehouse Co.
- New Bedford Public Warehouse Co.
- New Bedford Storage Whse. Co.
- Prospect Warehouse Co.
- Winslow-Mackenzie Co.

PEABODY
- Munroe & Arnold Merritt Express, Inc.

SOMERVILLE
- The Vacuum Co.

SPRINGFIELD
- Atlantic States Whse. & Cold Stge. Corp.
- Connecticut Valley Storage Whse. Co.
- Hartford Despatch & Warehouse Co.
- A. J. Lane Co.
- Litch Trucking Co.
- Sturtevant-Calderwood Co.

WORCESTER
- Colonial Warehouse & Distributing Co.
- Worcester Cold Storage & Warehouse Company

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NEW HAMPSHIRE

LACONIA
F. S. Willey & Co., Inc.

MANCHESTER
McLane & Taylor

RHODE ISLAND

PAWTUCKET
Darlington Warehouse Co.

DELAWARE

DOVER
Delmarva Warehouses, Inc.

DISTRICT OF COLUMBIA

WASHINGTON
Fidelity Storage Company
The Jacobs Transfer Co., Inc.
Metropolitan Warehouse Company
Terminal Refrigerating & Warehousing Corporation
The Terminal Storage Co. of Washington

MARYLAND

BALTIMORE
Baltimore Fidelity Warehouse Co.
Belt's Wharf Warehouses, Inc.
Camden Warehouses
Canton Co. of Baltimore
Central Warehouse Co., Inc.
McCormick Warehouse Co., Inc.
Merchants Terminal Corp.
Ruckert Terminal Corp.
The Terminal Warehouse Co. of Baltimore City

CUMBERLAND
Baltimore Fidelity Warehouse Co.

SALISBURY
Dennis Storage & Moving Co.

NEW JERSEY

ATLANTIC CITY
National Storage Warehouse Co.

BAYWAY
Bayway Terminal

CARLTON HILL
Metropolitan Warehouse Co., Inc.

ELIZABETH
Weimar Storage Co., Inc.

HOBOKEN
Campbell Stores
Hoboken Dock Co.
United States Testing Co., Inc.

RHODE ISLAND (Continued)

PROVIDENCE
The Cole Teaming Warehouse Co.
Fox Point Warehouses, Inc.
Merchants Cold Storage & Whse. Co.
Peoples Storage Warehouse Company
Providence Storage Company
Terminal Warehouse Co. of R. I., Inc.

WESTERLY
Rogers Company

REGION 2

NEW JERSEY (Continued)

PATERSON
Hayden's Transfer
Paterson Storage Co.

PORT NEWARK
Seaboard Storage Corp'n.

RUTHERFORD
George B. Holman & Company, Inc.

TRENTON
A. V. Mannings Sons

NEW YORK

ALBANY
Albany Term. & Sec. Warehouse Co., Inc.
Central Railway Terminal & Cold Storage Co., Inc.
Roberts Terminal Warehouse Co.

BINGHAMTON
E. W. Conklin & Son
C. C. Yager & Co., Inc.

BROOKLYN
Berkshire Transfer Corp'n.
Bisco Warehouse Corp.
Bowne-Morton's Stores, Inc.
Brooklyn Terminal Stores, Inc.
Brooklyn Waterfront Terminal Corp.
Butlers Warehouses, Inc.
Gerhard & Hartman, Inc.
Glasgow Storage Warehouse Company, Inc.
Gray Fleet Trucking Company, Inc.
Greenpoint Terminal Corp.
Michael Guthertz
Jay Street Terminal
Kings County Refrigerating Company
Long Island Storage Warehouses, Inc.
Luckman Brothers
McNally Brothers, Incorporated
Marino Brothers
Ed. J. Mooney
N. & W. Flour Trucking Company, Inc.
Pendola Flour Trucking Company
Pennsylvania Distillery, Inc.
Raffetto Brothers, Inc.
The Ridge Mills
Seaboard Storage Company
South Eleventh Street Whse. Corp.
Tooker Storage & Forwarding Co.
Wallabout Basin Storage & Term. Co., Inc.

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DELAWARE

DOVER
Delmarva Warehouses, Inc.

DISTRICT OF COLUMBIA

WASHINGTON
Fidelity Storage Company
The Jacobs Transfer Co., Inc.
Metropolitan Warehouse Company
Terminal Refrigerating & Warehousing Corporation
The Terminal Storage Co. of Washington

MARYLAND

BALTIMORE
Baltimore Fidelity Warehouse Co.
Bell's Wharf Warehouses, Inc.
Camden Warehouses
Canton Co. of Baltimore
Central Warehouse Co., Inc.
McCormick Warehouse Co., Inc.
Merchants Terminal Corp.
Ruckert Terminal Corp.
The Terminal Warehouse Co. of Baltimore City

CUMBERLAND
Baltimore Fidelity Warehouse Co.

SALISBURY
Dennis Storage & Moving Co.

NEW JERSEY

ATLANTIC CITY
National Storage Warehouse Co.

BAYWAY
Bayway Terminal

CARLTON HILL
Metropolitan Warehouse Co., Inc.

ELIZABETH
Weimar Storage Co., Inc.

HOBOKEN
Campbell Stores
Hoboken Dock Co.
United States Testing Co., Inc.

JERSEY CITY
Distillers Warehouse Corporation
Eastern Terminal Company.
Harborside Warehouse Co.
Jersey City Storage, Inc.
Lackawanna Terminal Warehouses, Inc.
Long Dock Co.
Union Terminal Cold Storage Co., Inc.

LONG BRANCH
James Calkins & Company

NEWARK
Job De Camp, Inc.
Essex Warehouse Co.
Lehigh Warehouse & Trans. Co.
Mercur Corp.
Newark Central Warehouse Co.
Waverly Stge. & Whse. Co., Inc.

NEW JERSEY (Continued)

PATERSON
Hayden's Transfer
Paterson Storage Co.

PORT NEWARK
Seaboard Storage Corp'n.

RUTHERFORD
George B. Holman & Company, Inc.

TRENTON
A. V. Mannings Sons

NEW YORK

ALBANY
Albany Term. & Sec. Warehouse Co., Inc.
Central Railway Terminal & Cold Storage Co., Inc.
Roberts Terminal Warehouse Co.

BINGHAMTON
E. W. Conklin & Son
C. C. Yager & Co., Inc.

BROOKLYN
Berkshire Transfer Corp'n.
Bisco Warehouse Corp.
Bowne-Morton's Stores, Inc.
Brooklyn Terminal Stores, Inc.
Brooklyn Waterfront Terminal Corp.
Butlers Warehouses, Inc.
Gerhard & Hartman, Inc.
Glasgow Storage Warehouse Company, Inc.
Gray Fleet Trucking Company, Inc.
Greenpoint Terminal Corp.
Michael Gutherts
Jay Street Terminal
Kings County Refrigerating Company
Long Island Storage Warehouses, Inc.
Luckman Brothers
McNally Brothers, Incorporated
Marino Brothers
Ed. J. Mooney
N. & W. Flour Trucking Company, Inc.
Pendola Flour Trucking Company
Pennsylvania Distillery, Inc.
Raffetto Brothers, Inc.
The Ridge Mills
Seaboard Storage Company
South Eleventh Street Whse. Corp.
Tooker Storage & Forwarding Co.
Wallabout Basin Storage & Term. Co., Inc.
The S. M. Wheeler Warehouse Co.

BUFFALO
Buffalo Freight Terminal Warehouse Co.
O. J. Glenn & Son, Inc.
Keystone Warehouse Co.
Knowlton Warehouse Co.
Larkin Co., Inc.
The Market Terminal Warehouse
Monarch Storage & W[redacted] Co.
M. Moran Transportation Lines, Inc.
Seneca Terminal & Storage Corp.
Terminals & Transportation Corp. of Amer.

ELMIRA
Joseph Bimberg Sons
A. C. Rice Storage Corp.

FAIRPORT
Fairport Storage & Ice Corp.

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NEW YORK (Continued)

ITHACA
Dean of Ithaca, Inc.

JAMESTOWN
Chautauqua Storage & Transfer Co.
Jamestown Warehouse

LONG ISLAND CITY
Manhattan Movers, Incorporated
Royal Warehouse Corp'n.

NEW YORK
Acker & Co., Inc.
Altobell Trucking Company
American Dock Co.
Arbuckle Brothers
Baker & Williams
Baltimore & Ohio Stores, Inc.
Beards' Erie Basin, Inc.
Wm. R. Boyce & Son, Inc.
W. D. Bresler, Incorporated
Bronx Refrigerating Co.
Brookhattan Terminal Warehouse Corp.
Burkam Brothers, Incorporated
Bush Terminal Co.
Columbia Storage Warehouses
Henry J. Comens, Inc.
Commercial Stores, Inc.
Conboy Trucking Corporation
Continental Milling & Whse. Co., Inc.
Continental Warehouse Corp.
Theodore Crowell, Inc.
Daniels & Kennody, Inc.
Dominion Warehouses, Incorporated
Downtown Storage Whse. Co., Inc.
Joseph Doyle, Inc.
Empire Forwarding Co.
A. O. Feidelson, Incorporated
Fidelity Warehouse Co.
Florsme Corporation
Flour Terminals, Incorporated
Fur Merchants Cold Storage Co., Inc.
General Warehouse Corporation
Gough & Semke, Inc.
Greenwich Street Stores
Adam Groll
C. C. Hamilton & Co., Inc.
Harris Warehouse, Inc.
James J. Harrison
Heermance Storage & Refrigerating Co.
Holland Warehouse Corp'n.
Independent Warehouses, Inc.
Insular Terminal Corporation
Jane Street Warehouse
Kierstead Warehouse & Forwarding Co., Inc.
Kingsbridge Auto Storage & Whse. Co., Inc.
L. & F. Stores
Lee Brothers, Inc.
Lehigh Harlem River Terminal Whse., Inc.
Lincoln Tidewater Terminals, Inc.
F. C. Linde Co.
The Long Dock Co.
Lynch Warehouses, Inc.
Manhattan Refrigerating Company
The Manhattan Storage & Warehouse Co.
T. I. McCormack Trucking Co., Inc.
The Jay A. Mellish Warehouses, Inc.
Merchants Refrigerating Co.
Midtown Warehouse, Inc.
Mott Haven Storage Warehouse Company, Inc.

NEW YORK (Continued)

NEW YORK (Continued)
Sclafani & Peckio, Incorporated
Seaboard Storage Corporation
Robert Shaw's U. S. Bonded Warehouses
Shephard Warehouse, Inc.
Silver Flour Warehouse & Trucking Corp'n.
State Warehouse Co., Inc.
Steamship Terminal Operating Corp'n.
Henry I. Stetler, Inc.
Sunset Warehouses, Inc.
Terminal Warehouse Co.
Towers Warehouses, Inc.
United Flour Trucking Company
Unity Warehouse Co.
Vestry Warehouses, Inc.
Warwick-Thomson Co.
Washington Market Warehouse
White's Warehouse, Incorporated

OSWEGO
Oswego Netherland Company, Incorporated
Wallace Storage Warehouse

ROCHESTER
B. R. & P. Warehouse, Inc.
Blanchard Storage Co., Inc.
C. & D. Warehouse Corp
Geo. M. Clancy Carting Co., Inc.
Clancy Carting & Storage Co., Inc.
B. G. Costich & Sons, Inc.
Exchange Warehouse Co., Inc.
Monroe Warehouse Company, Inc.
Rochester Storage Warehouses
Service Storage Co.
Upton Cold Storage Co., Inc.

SCHENECTADY
Schenectady Storage & Trucking Co.

STAPLETON
The Richmond Terminal Trucking Co., Inc.

SYRACUSE
Flagg Storage Warehouse Co.
Great Northern Warehouses
King Storage Warehouse Co., Inc.
Shefford Warehouse

UTICA
Broad Street Warehouse Corp
Jones-Clark Trucking & Storage Co., Inc.
Murray Warehouse Co., Inc.
Utica Warehouse Co., Inc.

WATERTOWN
Marcy-Buck & Wimslow, Inc.

YORKVILLE
Utica Warehouse Co., Inc.

PENNSYLVANIA

BETHLEHEM
Lehigh & New England Terminal Whse. Co.

ERIE
Erie Storage & Carting Co.
Fort Erie Warehouse & Docks

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Wm. R. Boyce & Son, Inc.
W. D. Bresler, Incorporated
Bronx Refrigerating Co.
Brookhattan Terminal Warehouse Corp.
Burkam Brothers, Incorporated
Bush Terminal Co.
Columbia Storage Warehouses
Henry J. Comens, Inc.
Commercial Stores, Inc.
Conboy Trucking Corporation
Continental Milling & Whse. Co., Inc.
Continental Warehouse Corp.
Theodore Crowell, Inc.
Daniels & Kennedy, Inc.
Dominion Warehouses, Incorporated
Downtown Storage Whse. Co., Inc.
Joseph Doyle, Inc.
Empire Forwarding Co.
A. O. Feidelson, Incorporated
Fidelity Warehouse Co.
Florame Corporation
Flour Terminals, Incorporated
Fur Merchants Cold Storage Co., Inc.
General Warehouse Corporation
Gough & Semke, Inc.
Greenwich Street Stores
Adam Groll
C. C. Hamilton & Co., Inc.
Harris Warehouse, Inc.
James J. Harrison
Heermance Storage & Refrigerating Co.
Holland Warehouse Corp'n.
Independent Warehouses, Inc.
Insular Terminal Corporation
Jane Street Warehouse
Kierstead Warehouse & Forwarding Co., Inc.
Kingsbridge Auto Storage & Whse. Co., Inc.
L. & F. Stores
Lee Brothers, Inc.
Lehigh Harlem River Terminal Whse., Inc.
Lincoln Tidewater Terminals, Inc.
F. C. Linde Co.
The Long Dock Co.
Lynch Warehouses, Inc.
Manhattan Refrigerating Company
The Manhattan Storage & Warehouse Co.
T. I. McCormack Trucking Co., Inc.
The Jay A. Mellish Warehouses, Inc.
Merchants Refrigerating Co.
Midtown Warehouse, Inc.
Mott Haven Storage Warehouse Company, Inc.
Murray & Jones
The National Cold Storage Co., Inc.
The National Storage Co.
New York Dock Co.
New York Piers, Incorporated
William H. Norman, Inc.
North & Dalzell, Incorporated
North River Stores, Inc.
Old Slip Warehouse, Inc.
Pennsylvania Storage Warehouse, Inc.
Piers, Inc.
Port Warehouses, Inc.
Postmann Flour Trucking Company, Inc.
Pouch Terminal, Inc.
Railroad Stores, Inc.
Republic Storage Co., Inc.
Rex Warehouses, Inc.
Rockefeller Center, Incorporated
C. Rudolph Warehouse Company, Inc.
Ruhe Storage & Trucking Co., Inc.
H. W. St. John & Co.

OSWEGO
Oswego Netherland Company, Incorporated
Wallace Storage Warehouse

ROCHESTER
B. R. & P. Warehouse, Inc.
Blanchard Storage Co., Inc.
C. & D. Warehouse Corp.
Geo. M. Clancy Carting Co., Inc.
Clancy Carting & Storage Co., Inc.
B. G. Costich & Sons, Inc.
Exchange Warehouse Co., Inc.
Monroe Warehouse Company, Inc.
Rochester Storage Warehouses
Service Storage Co.
Upton Cold Storage Co., Inc.

SCHENECTADY
Schenectady Storage & Trucking Co.

STAPLETON
The Richmond Terminal Trucking Co., Inc.

SYRACUSE
Flagg Storage Warehouse Co.
Great Northern Warehouses
King Storage Warehouse Co., Inc.
Shefford Warehouse

UTICA
Broad Street Warehouse Corp.
Jones-Clark Trucking & Storage Co., Inc.
Murray Warehouse Co., Inc.
Utica Warehouse Co., Inc.

WATERTOWN
Marcy-Buck & Winslow, Inc.

YORKVILLE
Utica Warehouse Co., Inc.

PENNSYLVANIA

BETHLEHEM
Lehigh & New England Terminal Whse. Co.

ERIE
Erie Storage & Carting Co.
Fort Erie Warehouse & Docks

HARRISBURG
Harrisburg Storage Company
Keystone Warehouse Company
Montgomery & Co.

HAZELTON
Karn's Transfer & Storage Co.

JOHNSTOWN
Johnstown Terminal Storage Company

LANCASTER
Lancaster Storage Company

PHILADELPHIA
Bailey Warehouses
Bredt's Warehouse
Commercial Warehousing Co.
Fenton Storage Co.
Gallagher's Warehouses
Hugh F. Gannon

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PENNSYLVANIA (Continued)

PHILADELPHIA (Continued)
General Warehouse Co.
Godley's Storage Warehouses
Guaranty Corporation
Kinney Distilling Company
Merchants Warehouse Co.
Northeastern Warehouse Co.
Pennsylvania Warehousing & Safe Deposit Co.
Philadelphia & Norfolk Steamship Company
Philadelphia Piers, Incorporated
Philadelphia Warehousing & Cold Stge. Co.
Rex & Co., Inc.
Terminal Commerce Building, Inc.
Terminal Warehouse Co.
Traders Warehouse

PITTSBURGH
W. J. Beitler Warehouse
Buley-Patterson-Potts Co.
Consolidated Storage Company
Duquesne Warehouse Co.
Iron City Elevator Co., Inc.
Kirby Transfer & Storage Co.

PENNSYLVANIA (Continued)

PITTSBURGH (Continued)
Pittsburgh Terminal Warehouse & Transfer Co.
South Side Transfer & Storage Co.
Superior Transfer & Storage Co.
Try Street Terminal Co.
Union Storage Co.
United Storage & Trucking Co.
White Terminal Co.

READING
Columbian Warehouse Co.
Wertz Warehouse Co.

SCRANTON
Merchants Storage Warehouse Company
Quackenbush Warehouse Co.

WILKES-BARRE
Matheson Warehouse Co.
Merchants Warehousing Co.
Wilkes-Barre Warehousing Co.

WILLIAMSPORT
Williamsport Storage Co., Inc.

REGION 3

ALABAMA

ANNISTON
Nixon Transfer & Coal Co.

BIRMINGHAM
Alabama Warehousing Co.
Flemming Transfer & Warehouse Co., Inc.
Harris Transfer & Warehouse Co.
Shaw Warehouse Co.
Strickland Transfer & Storage Co.
Wittichen Transfer & Warehouse Co.
H. C. Wright

MOBILE
Abbs Transfer Service
Alabama Warehousing Co.
Finch Warehousing Company
Gulf City Transfer Company, Incorporated
Merchants Transfer Co.
United Warehouse Co., Inc.

MONTGOMERY
Alabama Motor Transfer & Warehouse Co.
Moeller Transfer & Storage Co.
S. G. Weil Company

FLORIDA

JACKSONVILLE
Central Warehouse & Distributing Co.
Laney & Delcher Storage Co.
Peninsular Warehouse Co.
Service Warehouse Co., Inc.
Union Terminal Warehouse Co.
Vann Warehouse Co.
Wiesenfeld Warehouse Co.

MIAMI
American Brokerage & Commission Company
Apte Brothers
The J. F. Chaille Co. Warehouses

FLORIDA (Continued)

TAMPA
W. L. Blocks
Caldwell Bonded Warehouse Company
Lee Terminal & Warehouse Corp.
Tampa Stevedoring Co.
Tampa Union Terminal Co.
The Warehouse Inc.

WEST PALM BEACH
Brandon Transfer & Storage Co.

GEORGIA

ATLANTA
Atlanta Service Warehouse
Bonded Service Warehouse
J. A. Campbell, Inc.
Capitol City Warehouse Co.
Food Sales Co., Inc.
Fulton Warehouse Co.
General Warehouse & Storage Co., Inc.
Loeb-Apte Company
M. & M. Warehouse Co., Inc.
Martin & Zeagler, Inc.
Massey & Fair Inc.
Monroe Bonded Warehouses
C. B. Ponder Company
Pyburn Co.
Raley Brothers, Inc.
Security Warehouse Co.
Southeastern Bonded Warehouses
Terminal Warehouse Co.

AUGUSTA
City Bonded Warehouse Co.
Farmers & Merchants Bonded Warehouse

MACON

Traders Warehouse

PITTSBURGH
W. J. Beitler Warehouse
Buley, Patterson-Potts Co.
Consolidated Storage Company
Duquesne Warehouse Co.
Iron City Elevator Co., Inc.
Kirby Transfer & Storage Co.
Merchants Storage Warehouse Company
Quackenbush Warehouse Co.

WILKES-BARRE
Matheson Warehouse Co.
Merchants Warehousing Co.
Wilkes-Barre Warehousing Co.

WILLIAMSPORT
Williamsport Storage Co., Inc.

REGION 3

ALABAMA

ANNISTON
Nixon Transfer & Coal Co.

BIRMINGHAM
Alabama Warehousing Co.
Flemming Transfer & Warehouse Co., Inc.
Harris Transfer & Warehouse Co.
Shaw Warehouse Co.
Strickland Transfer & Storage Co.
Wittichen Transfer & Warehouse Co.
H. C. Wright

MOBILE
Abbs Transfer Service
Alabama Warehousing Co.
Finch Warehousing Company
Gulf City Transfer Company, Incorporated
Merchants Transfer Co.
United Warehouse Co., Inc.

MONTGOMERY
Alabama Motor Transfer & Warehouse Co.
Moeller Transfer & Storage Co.
S. G. Weil Company

FLORIDA

JACKSONVILLE
Central Warehouse & Distributing Co.
Laney & Delcher Storage Co.
Peninsular Warehouse Co.
Service Warehouse Co., Inc.
Union Terminal Warehouse Co.
Vann Warehouse Co.
Wiesenfeld Warehouse Co.

MIAMI
American Brokerage & Commission Company
Apte Brothers
The J. F. Chaille Co. Warehouses
Fireproof Storage Warehouses, Inc.
Flash Express & Storage Co., Inc.
General Warehouse & Storage Company
Hoskins & Green Company, Inc.
L. A. Jones, Inc.
Robbin's Warehouse & Distributing Co.
The Warehouse & Transfer Company, Incorporated
John E. Withers Transfer & Stge. Co., Inc.

ORLANDO
Fidelity Storage & Warehouse Co.

PENSACOLA
Ferriss Warehouse & Storage Co.
Ray Hardware & Truck Co. operating the Bonded Whse. Co.

FLORIDA (Continued)

TAMPA
W. L. Blocks
Caldwell Bonded Warehouse Company
Lee Terminal & Warehouse Corp.
Tampa Stevedoring Co.
Tampa Union Terminal Co.
The Warehouse Inc.

WEST PALM BEACH
Brandon Transfer & Storage Co.

GEORGIA

ATLANTA
Atlanta Service Warehouse
Bonded Service Warehouse
J. A. Campbell, Inc.
Capitol City Warehouse Co.
Food Sales Co., Inc.
Fulton Warehouse Co.
General Warehouse & Storage Co., Inc.
Loeb-Apte Company
M. & M. Warehouse Co., Inc.
Martin & Zeagler, Inc.
Massey & Fair Inc.
Monroe Bonded Warehouses
C. B. Ponder Company
Pyburn Co.
Raley Brothers, Inc.
Security Warehouse Co.
Southeastern Bonded Warehouses
Terminal Warehouse Co.

AUGUSTA
City Bonded Warehouse Co.
Farmers & Merchants Bonded Warehouse

MACON
Washburn Bonded Warehouse, Inc.

SAVANNAH
Savannah Bonded Whse. & Tfr. Co.
South Atlantic Storage Co.

KENTUCKY

CORBIN
A. J. Seibert Co., Inc.

LEXINGTON
Superior Service Warehouse Company
Union Transfer & Storage Co.
Vine St. Stge. & Whse. Co.

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KENTUCKY (Continued)

LOUISVILLE
Denby Motor Transfer Co., Inc.
Falls City Warehouse Co., Inc.
Huber & Huber Motor Express Terminal
Industrial Storage Co., Inc.
Kentucky Term. Whse. & Storage Co.
Lauppin Warehouse Co.
Louisville Public Warehouse Co.
Ninth Street Public Warehouse
Ohio River & Terminal Warehouse Company
A. J. Seibert Co., Inc. Props.
Louisville Sugar House
Southern Seed Company
Tabb Storage Whse. & Frt. Trans. Line

MISSISSIPPI

JACKSON
Ricks Storage Co.

MERIDIAN
Smith Transfer & Storage Co.

VICKSBURG
Z. B. Schwarz & Co.

NORTH CAROLINA

ASHEVILLE
Consolidated Warehouse Co.

CHARLOTTE
American Storage & Warehouse Co.
Robert F. Beatty
Britt-Shiver-Norcom, Inc.
A. J. Campbell Co.
Carolina Transfer & Storage Co.
Charlotte Distributing Co.
W. J. Edwards & Co.
Frederickson Motor Express Corporation
Kilgo Transfer Co., Inc.
Avery R. Rhyne
Standard Bonded Warehouses
Union Storage & Warehouse Co.

GREENSBORO
Champion Storage & Trucking Company
J. T. Dailey Company
South Atlantic Bonded Warehouse Corp.

HICKORY
Abernathy Transfer Company

HIGH POINT
Carolina Bonded Warehouse Co.
High Point Bonded Warehouse Co.

RALEIGH
Carolina Storage & Distributing Co.
Raleigh Bonded Warehouse, Inc.

WINSTON-SALEM
Lentz Transfer Storage Company

SOUTH CAROLINA

CHARLESTON
Charleston Warehouse & Forwarding Co.
George E. Martin

SOUTH CAROLINA (Continued)

SPARTANBURG
Britt Campany
Fowler & Edwards
J. L. Gentry
Piedmont Coastal Motor Express Corp.
Spartanburg Bonded Warehouses, Inc.

TENNESSEE

CHATTANOOGA
Arrow Transfer & Storage Co.
Chattanooga Transfer & Storage Co.
Crabtree Transfer & Storage Co., Inc.

EAST CHATTANOOGA
Textile Storage & Warehouse Co.

KNOXVILLE
Fireproof Storage & Van Co.
Rowe Transfer & Storage Company

MEMPHIS
Commercial Storage & Warehouse Co.
Dunbar Transfer & Storage Co., Inc.
General Whse. & Distributing Co.
Industrial Supplies Warehouse
Memphis Bonded Warehouse Co.
Merchants Warehouse Co.
P. & B. Transfer & Stge. Co., Inc.
Patterson Transfer Co.
John H. Poston Stge. Warehouses, Inc.
Rose Warehouse Co.
Tennessee Terminal Warehouses, Inc.
United Warehouse & Terminal Co.
P. H. Vernon Warehouse Co.

NASHVILLE
Bond, Chadwell Co.
Central Van & Storage Co.
Sam G. Douglass & Company
Kirkpatrick Brokerage Company
Nashville Warehouse & Elevator Corp.
The Price-Bass Co.
Henry W. Sawrie Co.
R. H. White Transfer & Storage Co.

PARIS
Union Transfer Co.

VIRGINIA

BRISTOL
Bristol Grocery Company, Incorporated

DANVILLE
Davis Storage & Warehouse Company

LYNCHBURG
Lynchburg Storage Co.

NEWPORT NEWS
Hiden Storage & Forwarding Co.

NORFOLK
The Bell Storage Co., Inc.
Fidelity Storage Company
D. D. Jones Transfer & Whse. Co.
Jones Cold Storage Corp.
Norfolk Tidewater Terminals
H. B. Rogers, Inc.
Security Storage & Safe Deposit Co., Inc.

MISSISSIPPI

JACKSON
Ricks Storage Co.

MERIDIAN
Smith Transfer & Storage Co.

VICKSBURG
Z. B. Schwarz & Co.

NORTH CAROLINA

ASHEVILLE
Consolidated Warehouse Co.

CHARLOTTE
American Storage & Warehouse Co.
Robert F. Beatty
Britt-Shiver-Norcom, Inc.
A. J. Campbell Co.
Carolina Transfer & Storage Co.
Charlotte Distributing Co.
W. J. Edwards & Co.
Frederickson Motor Express Corporation
Kilgo Transfer Co., Inc.
Avery R. Rhyne
Standard Bonded Warehouses
Union Storage & Warehouse Co.

GREENSBORO
Champion Storage & Trucking Company
J. T. Dailey Company
South Atlantic Bonded Warehouse Corp.

HICKORY
Abernathy Transfer Company

HIGH POINT
Carolina Bonded Warehouse Co.
High Point Bonded Warehouse Co.

RALEIGH
Carolina Storage & Distributing Co.
Raleigh Bonded Warehouse, Inc.

WINSTON-SALEM
Lents Transfer & Storage Company

SOUTH CAROLINA

CHARLESTON
Charleston Warehouse & Forwarding Co.
George F. Martin
Piedmont Coastal Motor Express Corp.

COLUMBIA
American Brokerage & Storage Company
Auld & White
Boineau's, Inc.
Carolina Bonded Storage Co.
Moffatt B. DuPre Company
Piedmont Coastal Motor Exp. Corp.

FLORENCE
W. H. Sydnor

GREENVILLE
Britt-McKinney Company
F. H. Edwards Co.
Piedmont Coastal Motor Express Corp.
Textile Warehouse Co.

EAST CHATTANOOGA
Textile Storage & Warehouse Co.

KNOXVILLE
Fireproof Storage & Van Co.
Rowe Transfer & Storage Company

MEMPHIS
Commercial Storage & Warehouse Co.
Dunbar Transfer & Storage Co., Inc.
General Whse. & Distributing Co.
Industrial Supplies Warehouse
Memphis Bonded Warehouse Co.
Merchants Warehouse Co.
P. & B. Transfer & Stge. Co., Inc.
Patterson Transfer Co.
John H. Poston Stge. Warehouses, Inc.
Rose Warehouse Co.
Tennessee Terminal Warehouses, Inc.
United Warehouse & Terminal Co.
P. H. Vernon Warehouse Co.

NASHVILLE
Bond, Chadwell Co.
Central Van & Storage Co.
Sam G. Douglass & Company
Kirkpatrick Brokerage Company
Nashville Warehouse & Elevator Corp.
The Price-Bass Co.
Henry W. Sawrie Co.
R. H. White Transfer & Storage Co.

PARIS
Union Transfer Co.

VIRGINIA

BRISTOL
Bristol Grocery Company, Incorporated

DANVILLE
Davis Storage & Warehouse Company

LYNCHBURG
Lynchburg Storage Co.

NEWPORT NEWS
Hideh Storage & Forwarding Co.

NORFOLK
The Bell Storage Co., Inc.
Fidelity Storage Company
D. D. Jones Transfer & Whse. Co.
Jones Cold Storage Corp.
Norfolk Tidewater Terminals
H. B. Rogers, Inc.
Security Storage & Safe Deposit Co., Inc.
Southgate Storage Co.
Virginia-Carolina Storage Company
West Storage Co.

NORTON
Norton Feed Company, Inc.

PETERSBURG
Petersburg Bonded Warehouse Corp.

RICHMOND
W. S. Forbes & Company
Terminal Storage Corp.
Virginia Bonded Whse. Corp.

ROANOKE
Finance & Storage Company
Mundy Brothers Transfer Corporation
Pitzer Transfer Corp.
Roanoke Public Warehouse

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WEST VIRGINIA

BLUEFIELD
City Warehouse Co.
Flat Top Warehouse Company
General Storage Co.

CHARLESTON
Elk Storage Warehouse Co.
Nelson Transfer & Storage Co.

CLARKSBURG
Central Storage Co.

WEST VIRGINIA (Continued)

HUNTINGTON
Duling Brothers
Maier Sales & Storage Co.
J. P. Woods & Company

PARKERSBURG
Citizens Transfer & Storage Company

WHEELING
J. E. Miller Transfer & Storage Company
Union Warehouse Holding Co.
Edward Wagner Fireproof Storage Co.
Wheeling Warehouse & Storage Company

REIGON 4

ILLINOIS

AURORA
Martin Transfer & Storage Co., Inc.
Valentine Transfer & Storage Co.

BELLEVILLE
W. L. Batdorf & Co.

BLOOMINGTON
The Johnson Transfer & Fuel Co.
V. B. Robinson & Company

CAIRO
Cairo River & Rail Warehouses
Cairo Warehouse & Forwarding Company
Glynn's Transfer & Fireproof Storage
Halliday Warehouse Co.
Pink & Co., Inc.

CANTON
Canton Distributing Company

CHAMPAIGN
Champaign Stge. & Whse. Co.
McArty Storage Co.

CHICAGO
Anchor Storage Co.
C & A Terminal Co.
Central Cold Storage Company
Central Storage & Forwarding Co.
Chapman & Smith Company
Continental Warehouse Company
Crooks Terminal Warehouses
Currier-Lee Warehouse Co.
Dietrich Warehousing Co.
Douglas-Guardian Warehouse Corporation
Dunning & Hill Transfer & Storage Company
Empire Warehouses, Inc.
Fogel Warehouse Company
Goold Storage Co.
Griswold-Walker-Bateman Co.
Herrmann Warehouse Co.
Illinois Warehouse Co.
Jefferson Parke Warehouse
Kel-Mer Warehouse Company
E. E. Kendall Company
Edward Lashin Co.
Loop River & Rail Terminal Warehouse
Merchandise Warehouses, Incorporated
Midland Warehouse & Transfer Co.
Mitchell-Jackson, Inc.
Nelson Warehouse & Express Company (Not Inc.)
The Newberry Transfer Company
North Central Terminals Co.
North Pier Terminals Co.
Ontario Warehouse Co.
Orleans-Ontario Warehouse
Producers Warehouse Co.
Railway Terminal & Warehouse Co.
Republic Warehouse Company

ILLINOIS (Continued)

CHICAGO (Continued)
Tooker Storage & Forwarding Co.
Twin City Trading Co.
Wakem & McLaughlin, Inc.
Western Warehousing Company

DANVILLE
Danville Transfer & Storage Co.
W. E. Glavey Warehouse Company

DECATUR
Decatur Warehouse Co.
Hamman Brothers Transfer & Storage Company

DIXON
Dixon Fruit Company

DuQUOIN
Owens Transfer

EAST ST. LOUIS
McMahon Transfer Co.
Mississippi Avenue Warehouses
Monsanto Bonded Storage Company

ELGIN
Elgin Storage & Transfer Company

FREEPORT
Freeport Fruit & Produce Company

GALESBURG
The Corn Belt Warehouse

JACKSONVILLE
Jacksonville Transfer & Stge. Co., Inc.

JOLIET
Joliet Warehouse & Transfer Co.

KANKAKEE
Belt Route Warehouse & Stge. Co.

KEWANEE
Mayhew & Wedge

LA SALLE
H. J. Tobler

MOLINE
Crandall Whse. & Transfer Co.

MOUNDS
Cairo Warehouse & Forwarding Company

OTTAWA

REIGON 4

ILLINOIS

AURORA
- Martin Transfer & Storage Co., Inc.
- Valentine Transfer & Storage Co.

BELLEVILLE
- W. L. Batdorf & Co.

BLOOMINGTON
- The Johnson Transfer & Fuel Co.
- V. B. Robinson & Company

CAIRO
- Cairo River & Rail Warehouses
- Cairo Warehouse & Forwarding Company
- Glynn's Transfer & Fireproof Storage
- Halliday Warehouse Co.
- Pink & Co., Inc.

CANTON
- Canton Distributing Company

CHAMPAIGN
- Champaign Stge. & Whse. Co.
- McArty Storage Co.

CHICAGO
- Anchor Storage Co.
- C & A Terminal Co.
- Central Cold Storage Company
- Central Storage & Forwarding Co.
- Chapman & Smith Company
- Continental Warehouse Company
- Crooks Terminal Warehouses
- Currier-Lee Warehouse Co.
- Dietrich Warehousing Co.
- Douglas-Guardian Warehouse Corporation
- Dunning & Hill Transfer & Storage Company
- Empire Warehouses, Inc.
- Fogel Warehouse Company
- Goold Storage Co.
- Griswold-Walker-Bateman Co.
- Herrmann Warehouse Co.
- Illinois Warehouse Co.
- Jefferson Parke Warehouse
- Kel-Mer Warehouse Company
- E. E. Kendall Company
- Edward Lashin Co.
- Loop River & Rail Terminal Warehouse
- Merchandise Warehouses, Incorporated
- Midland Warehouse & Transfer Co.
- Mitchell-Jackson, Inc.
- Nelson Warehouse & Express Company (Not Inc.)
- The Newberry Transfer Company
- North Central Terminals Co.
- North Pier Terminals Co.
- Ontario Warehouse Co.
- Orleans-Ontario Warehouse
- Producers Warehouse Co.
- Railway Terminal & Warehouse Co.
- Republic Warehouse Company
- Seng Terminal Warehouse Co.
- Seng Waterway Warehouse
- Slater's Fireproof Storage Company
- Soo Terminal Warehouse
- South End Warehouse Co.
- Sykes Terminal Warehouse
- Thomson Terminal Warehouses, Inc.

ILLINOIS (Continued)

CHICAGO (Continued)
- Tooker Storage & Forwarding Co.
- Twin City Trading Co.
- Wakem & McLaughlin, Inc.
- Western Warehousing Company

DANVILLE
- Danville Transfer & Storage Co.
- W. E. Glavey Warehouse Company

DECATUR
- Decatur Warehouse Co.
- Hamman Brothers Transfer & Storage Company

DIXON
- Dixon Fruit Company

DuQUOIN
- Owens Transfer

EAST ST. LOUIS
- McMahon Transfer Co.
- Mississippi Avenue Warehouses
- Monsanto Bonded Storage Company

ELGIN
- Elgin Storage & Transfer Company

FREEPORT
- Freeport Fruit & Produce Company

GALESBURG
- The Corn Belt Warehouse

JACKSONVILLE
- Jacksonville Transfer & Stge. Co., Inc.

JOLIET
- Joliet Warehouse & Transfer Co.

KANKAKEE
- Belt Route Warehouse & Stge. Co.

KEWANEE
- Mayhew & Wedge

LA SALLE
- H. J. Tobler

MOLINE
- Crandall Whse. & Transfer Co.

MOUNDS
- Cairo Warehouse & Forwarding Company

OTTAWA
- Scherer Bros. Transfer & Stge., Inc.

PANA
- Roley Bros. Transfer Co.

PEKIN
- Kriegsman Transfer Co.

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ILLINOIS (Continued)

PEORIA
Federal Warehouse Co.
Merchants Warehouse Company
National Warehouse Company, Inc.
O'Neill Brothers Transfer & Storage Company

PRINCETON
Larson Seed House

QUINCY
King Transfer Line

ROCKFORD
Bartlett Storage Warehouse Co.
Lawson Transfer & Storage Co.
Richards Storage & Van Company

ROCK ISLAND
Rock Island Transfer & Storage Co.
Voss Bros. Express & Storage Co.

SPRINGFIELD
Wm. H. Edwards
Hillier Storage Co.
Merchants Transfer & Storage Co.
Weidlocher & Sons, Inc.

STERLING
John Clayton Batteiger

STREATOR
Johnson Transfer & Storage Co.

TAYLORVILLE
H. R. Rinker

WAUKEGAN
Waukegan Terminal Whse. Co.

INDIANA

ANDERSON
W. A. Clark Transfer Company, Incorporated

EVANSVILLE
Broker Warehouse Co., Inc.
Evansville Warehouse Co.
Lex Terminal Warehouse Co.
Mead Johnson Terminal Corp.
The Terminal Warehouse Co., Inc.

FORT WAYNE
Fort Wayne Storage Co.
Mitchell Sales & Storage Company, Inc.
Pettit's Storage Warehouse Co.

GARY
Gary Warehouse Co.

HAMMOND
Chapin & Co.
Great Lakes Warehouse Corp.

HUNTINGTON
Bartlett Transfer & Stge. Company

INDIANAPOLIS
Advance Transfer & Storage Company
Bessire & Company, Inc.
Central Public Warehouse Co.
Central Transfer & Storage Co., Inc.
Central Union Truck Terminal, Inc.
Henry Coburn Storage & Whse. Co.
D. & D. Transfer & Storage Company

INDIANA (Continued)

LOGANSPORT
L. B. K. & I. Transit
Spencer Transfer & Storage Company
W. S. Twells Storage Company
Earl Winegardner Company

MUNCIE
Delaware Trucking Co., Inc.

NEW ALBANY
Denny Motor Transport Co.
Scott Public Warehouse Company

SOUTH BEND
Grand Trunk Terminal Warehouse Co.
Hodges & MacIntosh
National Storage Warehouse Co.
Ullery Storage Warehouse Co.

TERRE HAUTE
Bauermeister Terminal Company
Grube-Smith Company
Morge Delivery Company, Incorporated
Terre Haute Warehouse & Storage Company

VINCENNES
Vincennes Transfer & Storage Company

MICHIGAN

BATTLE CREEK
Battle Creek Storage Company
Emerson Truck & Storage Company

BAY CITY
Riverside Truck & Storage Co.
P. Van Haaren & Sons Storage Co., Inc.

CADILLAC
Cadillac Storage & Transfer Company

DETROIT
Aqua Terminal & Dock Corporation
Central Detroit Warehouse Co.
Detroit Harbor Terminals, Inc.
Detroit Refrigerating Co.
Edgar's Sugar House, Inc.
Federal Warehouse Co.
Grand Trunk Ry. Terminal & Cold Stge. Co.
The John Henry & Schram Storage & Trucking Co.
Jefferson Terminal Warehouse
Manufacturers Warehouse Company
Riverside Storage & Carting Company
Superior Warehouse Co.
Union Trucking Company
United States Warehouse Co.
Wayne Warehouse Company
G. B. Weaver & Co., Inc.

FLINT
Central Warehouse Co.

GRAND RAPIDS
Columbian Storage & Transfer Co.
Furniture Manufacturers Warehouse Company
Kent Storage Co.
Merchants Storage & Transfer Co.
Richards Storage Corporation
Service Storage Company
Star Transfer Line
Western Michigan Transfer & Storage Company

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Lawson Transfer & Storage Co.
Richards Storage & Van Company

ROCK ISLAND
Rock Island Transfer & Storage Co.
Voss Bros. Express & Storage Co.

SPRINGFIELD
Wm. H. Edwards
Hillier Storage Co.
Merchants Transfer & Storage Co.
Weidlocher & Sons, Inc.

STERLING
John Clayton Batteiger

STREATOR
Johnson Transfer & Storage Co.

TAYLORVILLE
H. R. Rinker

WAUKEGAN
Waukegan Terminal Whse. Co.

INDIANA

ANDERSON
W. A. Clark Transfer Company, Incorporated

EVANSVILLE
Broker Warehouse Co., Inc.
Evansville Warehouse Co.
Lex Terminal Warehouse Co.
Mead Johnson Terminal Corp.
The Terminal Warehouse Co., Inc.

FORT WAYNE
Fort Wayne Storage Co.
Mitchell Sales & Storage Company, Inc.
Pettit's Storage Warehouse Co.

GARY
Gary Warehouse Co.

HAMMOND
Chapin & Co.
Great Lakes Warehouse Corp.

HUNTINGTON
Bartlett Transfer & Stge. Company

INDIANAPOLIS
Advance Transfer & Storage Company
Bessire & Company, Inc.
Central Public Warehouse Co.
Central Transfer & Storage Co., Inc.
Central Union Truck Terminal, Inc.
Henry Coburn Storage & Whse. Co.
D. & D. Transfer & Storage Company
Indiana Naval Stores Company
Indiana Terminal & Refrigerating Co.
Indianapolis Warehouse & Storage Company
Koschnick & Company
The Lauter Warehouse Co.
Mann Transfer & Storage Co., Inc.
Strohm Warehouse & Cartage Co.
Tripp Warehouse Co.

JEFFERSONVILLE
Jeffersonville Public Warehouse, Incorporated

LAFAYETTE
Joe Ardapple Storage & Transfer Company
Hodges & MacIntosh
National Storage Warehouse Co.
Ullery Storage Warehouse Co.

TERRE HAUTE
Bauermeister Terminal Company
Grube-Smith Company
Morge Delivery Company, Incorporated
Terre Haute Warehouse & Storage Company

VINCENNES
Vincennes Transfer & Storage Company

MICHIGAN

BATTLE CREEK
Battle Creek Storage Company
Emerson Truck & Storage Company

BAY CITY
Riverside Truck & Storage Co.
P. Van Haaren & Sons Storage Co., Inc.

CADILLAC
Cadillac Storage & Transfer Company

DETROIT
Aqua Terminal & Dock Corporation
Central Detroit Warehouse Co.
Detroit Harbor Terminals, Inc.
Detroit Refrigerating Co.
Edgar's Sugar House, Inc.
Federal Warehouse Co.
Grand Trunk Ry. Terminal & Cold Stge. Co.
The John Henry & Schram Storage & Trucking Co.
Jefferson Terminal Warehouse
Manufacturers Warehouse Company
Riverside Storage & Carting Company
Superior Warehouse Co.
Union Trucking Company
United States Warehouse Co.
Wayne Warehouse Company
G. B. Weaver & Co., Inc.

FLINT
Central Warehouse Co.

GRAND RAPIDS
Columbian Storage & Transfer Co.
Furniture Manufacturers Warehouse Company
Kent Storage Co.
Merchants Storage & Transfer Co.
Richards Storage Corporation
Service Storage Company
Star Transfer Line
Western Michigan Transfer & Storage Company

HANCOCK
Rowe's Terminal Warehouse

IRON MOUNTAIN
W. D. Cochran Warehouse

IRONWOOD
F. H. Kearney Company

JACKSON
Union Truck & Storage Company

KALAMAZOO
National Storage Company

LANSING
Farm Bureau Services, Incorporated
Fireproof Storage Co.

MARQUETTE
Flanigan Brothers Storage Company

MUSKEGON
Richards Storage Corp.

PONTIAC
Pontiac Industrial Buildings, Incorporated

PORT HURON
United Trucking Service, Inc.

SAGINAW
Central Warehouse Company

SOUTH HAVEN
South Haven Term. Co., Inc.

OHIO

AKRON
The American Storage & Transfer Company
Belleville Warehouse Company
The Cotter City View Storage Company
Knickerbocker Warehouse & Storage Company
Star Warehouse Company, Incorporated

ASHTABULA
Ashtabula Fireproof Storage Co., Inc.

CANTON
Canton Storage, Inc.
Cummins Storage Co.
McKinley Storage & Transfer Co.
W. H. Schneider Storage Co.

CINCINNATI
Baltimore & Ohio Warehouse Co.
The Cincinnati Ice Mfg. & Cold Stge. Co.
Cincinnati Merchandise Warehouses, Inc.
Cincinnati Storage & Whse. Co., Inc.
Cincinnati Terminal Warehouses, Inc.
The Cincinnati Transfer Co.
Front & Butler Warehouses, Inc.
Gruner & Beckwith Company
Meinch Drayage Co.
The Wallace Transfer & Forwarding Co.

CLEVELAND
Bramley Storage Company
Britten Terminal, Incorporated
Central Storage Warehouse Co.
The Cleveland Storage Co.
Consolidated Cartage & Storage Co.
The Curtis Bros. Transfer Co.
The Distr. Term. & Cold Storage Co.
The East 45th St. Warehouse Co.
William Edwards Co.
Greeley-General Warehouse Co.
The Gregg Cartage & Storage Company
Lederer Terminal Warehouse Co.
Liberty Cartage Company
The Lincoln Storage Company
National Terminals Corp.
Pyramid Storage & Moving Company
Railway Warehouses, Inc.
Security Warehouse & Cartage, Inc.
Shaw Warehouse Company
The Sheriff St. Mkt. & Storage Co.
Warehouse & Dist. Service, Incorporated

DAYTON
Thomas F. Larkin Warehouse & Cartage Company
The Peerless Storage Company
Union Storage Co.

HAMILTON
Cincinnati Storage & Warehouse Co.

LIMA
Evans Coal Company
Lima Truck & Storage Co.
Stelzer Truck & Storage Company

MANSFIELD
The Pioneer Storage Company

MARION
Wright Transfer & Storage Company

MIDDLETOWN
Cincinnati Storage & Warehouse Co.

SPRINGFIELD
Wagner Warehouse Corporation

STEUBENVILLE
Jefferson Storage Warehouse Co.

TOLEDO
Brundage Bros. Co.
The Sam Davis Co.
Great Lakes Terminal Whse. Co. of Toledo
Harbor Terminals, Inc.
Merchants & Manufacturers Warehouse Co.
Moreton Storage Co.
National Terminals Corp.
The Rathburn Cartage Company
Toledo Terminal Warehouse Co.

YOUNGSTOWN
Fisher-Gilder Cartage & Storage Co.
G. A. Webster Electric Company
Youngstown-Erie Terminal Co.

ZANESVILLE
Wilson & Hamilton Storage & Transfer Company

WISCONSIN

APPLETON
Harry H. Long Moving & Storage

EAU CLAIRE
Eau Claire Warehouse Co.
Sioux Storage & Forwarding Co.

FOND DU LAC
Anchor Transfer & Storage Company

GREEN BAY
Brown County Warehouses, Inc.
Hillside Garage & Transit Company, Inc.
Leicht Transfer & Storage Co.
Jules Peters Transfer & Storage Co.

JANESVILLE
The Geo. H. Hammes Trf. & Stge. Co.
Ward Brothers

KENOSHA
David Nelson & Son Fireproof Storage

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PORT HURON
United Trucking Service, Inc.

SAGINAW
Central Warehouse Company

SOUTH HAVEN
South Haven Term. Co., Inc.

OHIO

AKRON
The American Storage & Transfer Company
Belleville Warehouse Company
The Cotter City View Storage Company
Knickerbocker Warehouse & Storage Company
Star Warehouse Company, Incorporated

ASHTABULA
Ashtabula Fireproof Storage Co., Inc.

CANTON
Canton Storage, Inc.
Cummins Storage Co.
McKinley Storage & Transfer Co.
W. H. Schneider Storage Co.

CINCINNATI
Baltimore & Ohio Warehouse Co.
The Cincinnati Ice Mfg. & Cold Stge. Co.
Cincinnati Merchandise Warehouses, Inc.
Cincinnati Storage & Whse. Co., Inc.
Cincinnati Terminal Warehouses, Inc.
The Cincinnati Transfer Co.
Front & Butler Warehouses, Inc.
Gruner & Beckwith Company
Meinch Drayage Co.
The Wallace Transfer & Forwarding Co.

CLEVELAND
Bramley Storage Company
Britten Terminal, Incorporated
Central Storage Warehouse Co.
The Cleveland Storage Co.
Consolidated Cartage & Storage Co.
The Curtis Bros. Transfer Co.
The Distr. Term. & Cold Storage Co.
The East 45th St. Warehouse Co.
William Edwards Co.
Greeley-General Warehouse Co.
The Gregg Cartage & Storage Company
Lederer Terminal Warehouse Co.
Liberty Cartage Company
The Lincoln Storage Company
National Terminals Corp.
Pyramid Storage & Moving Company
Railway Warehouses, Inc.
Security Warehouse & Cartage, Inc.
Shaw Warehouse Company
The Sheriff St. Mkt. & Storage Co.
Warehouse & Dist. Service, Incorporated

COLUMBUS
Bazler Transfer & Storage Company, Inc.
Capitol Warehouse Company
Columbus Terminal Warehouse Co.
Columbus Warehouses, Inc.
Great Western Storage Company
The Kutschbach-McNally Co.
The Merchandise Warehouse Co.
The Neilston Warehouse Co.

COCHOCTON
The F. Beutenmiller & Son Company

[illegible]
Stelzer Truck & Storage Company

MANSFIELD
The Pioneer Storage Company

MARION
Wright Transfer & Storage Company

MIDDLETOWN
Cincinnati Storage & Warehouse Co.

SPRINGFIELD
Wagner Warehouse Corporation

STEUBENVILLE
Jefferson Storage Warehouse Co.

TOLEDO
Brundage Bros. Co.
The Sam Davis Co.
Great Lakes Terminal Whse. Co. of Toledo
Harbor Terminals, Inc.
Merchants & Manufacturers Warehouse Co.
Moreton Storage Co.
National Terminals Corp.
The Rathburn Cartage Company
Toledo Terminal Warehouse Co.

YOUNGSTOWN
Fisher-Gilder Cartage & Storage Co.
G. A. Webster Electric Company
Youngstown-Erie Terminal Co.

ZANESVILLE
Wilson & Hamilton Storage & Transfer Company

WISCONSIN

APPLETON
Harry H. Long Moving & Storage

EAU CLAIRE
Eau Claire Warehouse Co.
Sioux Storage & Forwarding Co.

FOND DU LAC
Anchor Transfer & Storage Company

GREEN BAY
Brown County Warehouses, Inc.
Hillside Garage & Transit Company, Inc.
Leicht Transfer & Storage Co.
Jules Peters Transfer & Storage Co.

JANESVILLE
The Geo. H. Hammes Trf. & Stge. Co
Ward Brothers

KENOSHA
David Nelson & Son Fireproof Storage

LA CROSSE
Gateway City Trans. & Stge. Co.
La Crosse Terminal Warehouse Co.
LaCrosse Transfer Line

MADISON
Hillside Garage & Transit Company
Madison Fireproof Warehouse
The Union Transfer & Storage Company

MANITOWOC
Manitowoc Refrigerating Company
S. W. Randolph Storage & Warehouse

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WISCONSIN (Continued)

MILWAUKEE
Atlas Storage Co.
Badger Storage Warehouse Co.
Barclay Warehouse Co.
Barry Transfer & Storage Co., Inc.
Boulevard Fireproof Warehouses, Incorporated
Carlson Storage Co.
Courteen Seed Co.
Stephen H. Du Puy
Hansen Storage Co.
Hiliside Garage & Transit Company
Kellogg Seed Company
Otto L. Kuehn Company
Lincoln Fireproof Warehouse Co.
Milwaukee Fireproof Storage Company
Milwaukee Transfer & Storage Co.
Murphy Warehouse Company
National Terminals Corp.
National Warehouse Corp.
W. J. Nugent Contracting & Storage

WISCONSIN (Continued)

MILWAUKEE (Continued)
Roegge Storage & Delivery Co.
Terminal Warehouse, Incorporated
L. Teweles Seed Co.
United Fireproof Storage Company

OSHKOSH
Oshkosh Storage Co.
Riverside Storage Company

RACINE
Racine Storage & Transfer Company
Ross Moving & Storage Co.

SHEBOYGAN
Sheboygan Furniture & Forwarding Co.

WAUSAU
Hillside Garage & Transit Company
Wausau Service Company, Incorporated

REGION 5

SUPERIOR, WISCONSIN

SUPERIOR
Hill Warehouse & Trucking Co.
Superior and Duluth Transfer Co.

MINNESOTA

DULUTH
Bridgeman-Russell Company
Duluth Van & Storage Co.
McDougall Terminal & Cold Storage Co.
Northern Cold Storage & Warehouse Co.
Security Storage & Van Co.

MANKATO
Jessup Storage & Moving Co.

MINNEAPOLIS
Anchor Warehouse, Inc.
Cameron Transfer & Storage Co.
Colonial Warehouses, Inc.
Great Northern Warehouse Co., Inc.
Kedney Warehouse Co.
La Belle Safety Storage Company
Merchants Cold Storage Co.
Minneapolis Terminal Warehouse Co.
Minneapolis Transfer & Warehouse Company
Northwest Warehousing Co.
Northwestern Terminal Co.
Security Warehouse Co.
Skellet Company
Sterling Cartage Company
Twin City Trading Co.
Widholm Transfer & Storage Co.

MOORHEAD
Moorhead Storage & Transfer Co.

ROCHESTER
Carey's Transfer & Storage Company

ST. PAUL
Central Warehouse Co.
Fidelity Storage & Transfer Co.
Kedney Warehouse Co.
St. Paul Terminal Warehouse Co.

WINONA

MONTANA (Continued)

BUTTE
Bertoglio & McTaggart Stge. Co.
Christie Transfer & Storage Co.
Jones Storage & Transfer Co., Inc.

GREAT FALLS
Great Falls Transfer & Storage Co.

HAVRE
United Transfer & Storage Company

HELENA
Diamond "C" Transfer

MISSOULA
Blair Transfer & Storage Company
Reely's Storage & Transfer

NORTH DAKOTA

BISMARCK
Wachter Transfer Corp.

FARGO
Adams Transfer & Storage
Union Storage & Transfer Co.

GRAND FORKS
Kedney Warehouse Co. of North Dakota

JAMESTOWN
Jamestown Warehouse Co.

SOUTH DAKOTA

ABERDEEN
Jobbers Warehouse, Ward-Owsley Co.
Security Warehouse Company

HURON
Central Warehouse Company

RAPID CITY
North Western Warehouse Co.

Otto L. Kuehn Company
Lincoln Fireproof Warehouse Co.
Milwaukee Fireproof Storage Company
Milwaukee Transfer & Storage Co.
Murphy Warehouse Company
National Terminals Corp.
National Warehouse Corp.
W. J. Nugent Contracting & Storage
Ross Moving & Storage Co.

SHEBOYGAN
Sheboygan Furniture & Forwarding Co.

WAUSAU
Hillside Garage & Transit Company
Wausau Service Company, Incorporated

REGION 8

SUPERIOR, WISCONSIN

SUPERIOR
Hill Warehouse & Trucking Co.
Superior and Duluth Transfer Co.

MINNESOTA

DULUTH
Bridgeman-Russell Company
Duluth Van & Storage Co.
McDougall Terminal & Cold Storage Co.
Northern Cold Storage & Warehouse Co.
Security Storage & Van Co.

MANKATO
Jessup Storage & Moving Co.

MINNEAPOLIS
Anchor Warehouse, Inc.
Cameron Transfer & Storage Co.
Colonial Warehouses, Inc.
Great Northern Warehouse Co., Inc.
Kedney Warehouse Co.
La Belle Safety Storage Company
Merchants Cold Storage Co.
Minneapolis Terminal Warehouse Co.
Minneapolis Transfer & Warehouse Company
Northwest Warehousing Co.
Northwestern Terminal Co.
Security Warehouse Co.
Skellet Company
Sterling Cartage Company
Twin City Trading Co.
Widholm Transfer & Storage Co.

MOORHEAD
Moorhead Storage & Transfer Co.

ROCHESTER
Carey's Transfer & Storage Company

ST. PAUL
Central Warehouse Co.
Fidelity Storage & Transfer Co.
Kedney Warehouse Co.
St. Paul Terminal Warehouse Co.

WINONA
Hodgins Transfer & Storage Co.

MONTANA

BILLINGS
Baker Transfer & Storage Co., Inc.
Billings Warehouse & Trading Co.

MONTANA (Continued)

BUTTE
Bertoglio & McTaggart Stge. Co.
Christie Transfer & Storage Co.
Jones Storage & Transfer Co., Inc.

GREAT FALLS
Great Falls Transfer & Storage Co.

HAVRE
United Transfer & Storage Company

HELENA
Diamond "C" Transfer

MISSOULA
Blair Transfer & Storage Company
Reely's Storage & Transfer

NORTH DAKOTA

BISMARCK
Wachter Transfer Corp.

FARGO
Adams Transfer & Storage
Union Storage & Transfer Co.

GRAND FORKS
Kedney Warehouse Co. of North Dakota

JAMESTOWN
Jamestown Warehouse Co.

SOUTH DAKOTA

ABERDEEN
Jobbers Warehouse, Ward-Owaley Co.
Security Warehouse Company

HURON
Central Warehouse Company

RAPID CITY
North Western Warehouse Co.

SIOUX FALLS
Sioux Distributing Company
Strahon Transfer & Storage Company
Wilson Storage & Transfer Company

WATERTOWN
Dakota Warehouse Co.

REGION 6

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IOWA

AMES
Dragoun Transfer & Storage Co.

ATLANTIC
Atlantic Motor Freight

BOONE
Wilson's Transfer & Storage

CEDAR RAPIDS
American Transfer & Storage Co.
Calder's Van & Storage Co., Inc.
Cedar Rapids Transfer & Storage Company
P. J. Ernst Auto Storage
Lynch Transfer Co., Inc.
Ben H. Witwer

CLINTON
Carstensen Transfer & Storage Co.

COUNCIL BLUFFS
Ford Bros. Van & Storage Co.
Interstate Transfer & Storage Company

DAVENPORT
Ewert & Richter Exp. & Stge. Co.
Masons Garage
Merchants Transfer & Storage Co.
Roederer Transfer & Storage Co.

DES MOINES
Blue Island Storage Co.
Hawkeye Transfer Co., Inc.
Merchants Transfer & Storage Co.
Ware Transfer & Storage Co.
White Line Transfer & Storage Co.

DUBUQUE
The Martin-Strelau Co.

FORT DODGE
Brady Transfer & Storage Co.
Sherman Storage & Transfer Line
White Transfer & Storage Co

IOWA CITY
Iowa City Warehouse Company

MARSHALLTOWN
National Transfer & Storage Company

MASON CITY
Cadwell Transfer & Storage Co.
Mason City Warehouse Corporation
Veech Transfer & Storage Company

SHELDON
McKay & Krahling

SIOUX CITY
Bekins Merchandise Storage
Dougherty Storage & Van Co.
Sioux City Storage & Forwarding Co.

KANSAS

ARKANSAS CITY
Ark Warehouse Company

KANSAS (Continued)

PARSONS
Parsons Cold Storage Co.

PITTSBURG
Merchants Transfer & Warehouse Co.
Pittsburg Transfer & Storage Co.

PRATT
Riley's Truck Line

SALINA
Stevenson Transfer Co.

TOPEKA
Kansas Transfer & Storage Co.
Topeka Transfer & Storage Co.

WICHITA
Broker's Office & Warehouse Co.
The Cassell Transfer & Storage Co.
Central Warehouse & Storage Company
Le Kron & Woodring Transfer & Storage Company
Merchants Transfer & Whse. Co., Inc.
Mid-Continent Warehouse Company
Peoples Transfer & Storage Co.
Southwest Transfer & Storage Company
United Warehouse Co.
Wichita Yellow Cab Co., Inc.

MISSOURI

CARTHAGE
Carthage Transfer & Storage Co.

COLUMBIA
The '23' Transfer & Storage Company

HANNIBAL
Caverly Transfer Line
Hannibal Flour Feed & Seed Company

JOPLIN
The Inter-State Grocer Company
Joplin Transfer & Storage Co.
Marlatt Transfer & Storage Company
Tonnies Transfer & Storage Co.

KANSAS CITY
A-B-C Fireproof Warehouse Co.
Abner Hood Chemical Company
Adams Transfer & Storage Co.
Central Storage Co.
Crooks Terminal Warehouses
Empire Storage & Ice Co.
Evans Transfer & Stge. Co.
Kansas City Power & Light Co.
J. T. Kennedy Sales Company
Liberty Storage Co.
W. E. Murray Transfer & Storage Co.
The Mutual Transfer Co.
The Only Way Transfer & Warehouse Co.
Radial Warehouse Co.
Rairdon Transfer & Warehouse Co.
The Rhodes Implement Co.
H. H. Smith Storage Co.
United Warehouse Co.
Walnut Storage & Distributing Company

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Cedar Rapids Transfer & Storage Company
P. J. Ernst Auto Storage
Lynch Transfer Co., Inc.
Ben H. Witwer

CLINTON
Carstensen Transfer & Storage Co.

COUNCIL BLUFFS
Ford Bros. Van & Storage Co.
Interstate Transfer & Storage Company

DAVENPORT
Ewert & Richter Exp. & Stge. Co.
Masons Garage
Merchants Transfer & Storage Co.
Roederer Transfer & Storage Co.

DES MOINES
Blue Island Storage Co.
Hawkeye Transfer Co., Inc.
Merchants Transfer & Storage Co.
Ware Transfer & Storage Co.
White Line Transfer & Storage Co.

DUBUQUE
The Martin-Strelau Co.

FORT DODGE
Brady Transfer & Storage Co.
Sherman Storage & Transfer Line
White Transfer & Storage Co.

IOWA CITY
Iowa City Warehouse Company

MARSHALLTOWN
National Transfer & Storage Company

MASON CITY
Cadwell Transfer & Storage Co.
Mason City Warehouse Corporation
Veech Transfer & Storage Company

SHELDON
McKay & Krahling

SIOUX CITY
Bekins Merchandise Storage
Dougherty Storage & Van Co.
Sioux City Storage & Forwarding Co.

KANSAS

ARKANSAS CITY
Ark Warehouse Company

COFFEYVILLE
Hastings Transfer Company

DODGE CITY
Dodge City Transfer & Storage Company
The Dodge City Warehouse Company
Woolwine's Transfer & Storage Co.

EMPORIA
L. R. Bailey Transfer & Storage Co.

HUTCHINSON
Cody Transfer & Storage Company

KANSAS CITY
Grandview Club Transfer & Storage Co.
Inter-state Transfer & Storage Company
The North American Provision Company

TOPEKA
Kansas Transfer & Storage Co.
Topeka Transfer & Storage Co.

WICHITA
Broker's Office & Warehouse Co.
The Cassell Transfer & Storage Co.
Central Warehouse & Storage Company
Le Kron & Woodring Transfer & Storage Company
Merchants Transfer & Whse. Co., Inc.
Mid-Continent Warehouse Company
Peoples Transfer & Storage Co.
Southwest Transfer & Storage Company
United Warehouse Co.
Wichita Yellow Cab Co., Inc.

MISSOURI

CARTHAGE
Carthage Transfer & Storage Co.

COLUMBIA
The '23' Transfer & Storage Company

HANNIBAL
Caverly Transfer Line
Hannibal Flour Feed & Seed Company

JOPLIN
The Inter-State Grocer Company
Joplin Transfer & Storage Co.
Marlatt Transfer & Storage Company
Tonnies Transfer & Storage Co.

KANSAS CITY
A-B-C Fireproof Warehouse Co.
Abbet Hood Chemical Company
Adams Transfer & Storage Co.
Central Storage Co.
Crooks Terminal Warehouses
Empire Storage & Ice Co.
Evans Transfer & Stge. Co.
Kansas City Power & Light Co.
J. T. Kennedy Sales Company
Liberty Storage Co.
W. E. Murray Transfer & Storage Co.
The Mutual Transfer Co.
The Only Way Transfer & Warehouse Co.
Radial Warehouse Co.
Rairdon Transfer & Warehouse Co.
The Rhodes Implement Co.
H. H. Smith Storage Co.
United Warehouse Co.
Walnut Storage & Distributing Company

ST. JOSEPH
Brown Transfer & Storage Co.
St. Joseph Transfer & Stge. Co.
Terminal Warehouses of St. Joseph, Inc.

ST. LOUIS
Arrow Storage Co., Inc.
Booth Cold Storage Co.
Broadway Terminal Warehouse Corp.
Central Terminal Co.
Columbia Terminals Co.
Grocer's Warehouse Company
Howlan Warehouse Company
S. N. Long Warehouse
Madison Street Terminal Warehouse Corp'n.
McPheeter's Warehouse Co.

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MISSOURI (Continued)

ST. LOUIS (Continued)
Missouri Warehousing Co.
Mound City Ice & Cold Storage Company
Rutger St. Warehouse, Inc.
St. Louis Distributing Whse. Co.
St. Louis Mart, Inc.
St. Louis Terminal Warehouse Co.
Talbot Terminal Warehouse Co.
Tyler Warehouse Co.
Weber Drayage & Warehouse Company

SEDALIA
Shafer Storage Company

SPRINGFIELD
Finkbiner Transfer & Storage Co.
Springfield Warehouse & Transfer Co.
Whitehead Transfer & Storage Company

NEBRASKA

ALLIANCE
E. H. Boyd
City Transfer & Storage Company

BEATRICE
A. Palmer Company

BRIDGEPORT
Bottling & Storage Company

COLUMBUS
Columbus Fuel & Storage Company

FREMONT
Union Transfer Co.

NEBRASKA (Continued)

GRAND ISLAND
Sullivan's Grand Island Storage Company

HASTINGS
Borley Storage & Transfer Co., Inc.

LINCOLN
Star Van & Storage Co.
Sullivan Transfer & Storage Co.
Union Terminal Warehouse Co.

McCOOK
A. C. Wright

NORTH PLATTE
Brown Fruit Company
Cohagen Transfer & Storage Company

OMAHA
Bekins Van & Storage Co.
Buehman Warehouse & Storage Co.
Central Storage & Van Co.
Fidelity Storage & Van Co., Inc.
Ford Bros. Van & Storage Co.
Gordon Storage Warehouses, Inc.
Jerpe Cold Storage Company
Knowles Storage & Moving Co.
T. A. McDonald
Pacific Storage & Warehouse Co.
The Terminal Warehouse Co.
Trimble Brothers

SCOTTS BLUFF
Buplinger Storage & Transfer Co.

REGION 7

ARKANSAS

EL DORADO
Black Transfer & Storage Company

FORT SMITH
Arkansas Warehouse Co.
O. K. Transfer & Storage Co.

LITTLE ROCK
Commercial Warehouse Co.
Merchants Transfer & Warehouse Co.
Terminal Warehouse Co.

TEXARKANA
Hunter Transfer & Storage Co.

LOUISIANA

ALEXANDRIA
Carnahan's Transfer & Storage Co.
Trousdale, Wright & Keller, Inc.

BATON ROUGE
S. A. Harris Transfer & Stge. Co., Inc.
Port of Baton Rouge, Municipal Docks, Term. & Whse.

LAKE CHARLES
United Whse. & Forwarding Co., Inc.

MONROE
W. M. Black & Company
Faulk-Collier Bonded Warehouses, Inc.
Monroe Transfer & Storage

LOUISIANA (Continued)

NEW ORLEANS (Continued)
Douglas Public Service Corp.
Douglas Shipside Storage Corp.
Gough-Brokerage Company, Inc.
Importers Bonded Warehouse Company
Independent Warehouse Co., Inc.
Kentucky Coffee Warehouse Co.
Maloney Trucking & Storage, Inc.
New Orleans Compress Company, Inc.
Orleans Warehouses Corp., Inc.
Pelican Storage & Transfer Company
Rebecca-Fabacher, Inc.
Riverside Warehouses, Inc.
Shipside Storage Co., Inc.
Standard Warehouse Co., Inc.

SHREVEPORT
Caddo Transfer & Warehouse Co., Inc.
Herrin Transfer & Warehouse Co., Inc.
McGee Warehouse & Storage Co.
O. K. Storage & Van Co., Inc.
Terminal Warehouse & Trf. Co., Inc.

NEW MEXICO

ALBUQUERQUE
Shufflebarger Transfer & Storage Co., Inc.
Springer Transfer Co., Inc.

OKLAHOMA

Shaler Storage Company

SPRINGFIELD
Finkbiner Transfer & Storage Co.
Springfield Warehouse & Transfer Co.
Whitehead Transfer & Storage Company

NEBRASKA

ALLIANCE
E. H. Boyd
City Transfer & Storage Company

BEATRICE
A. Palmer Company

BRIDGEPORT
The Bottling & Storage Company

COLUMBUS
Columbus Fuel & Storage Company

FREMONT
Union Transfer Co.

NORTH PLATTE
Brown Fruit Company
Cohagen Transfer & Storage Company

OMAHA
Bekins Van & Storage Co.
Bushman Warehouse & Storage Co.
Central Storage & Van Co.
Fidelity Storage & Van Co., Inc.
Ford Bros. Van & Storage Co.
Gordon Storage Warehouses, Inc.
Jerpe Cold Storage Company
Knowles Storage & Moving Co.
T. A. McDonald
Pacific Storage & Warehouse Co.
The Terminal Warehouse Co.
Trimble Brothers

SCOTT'S BLUFF
Ruplinger Storage & Transfer Co.

REGION 7

ARKANSAS

EL DORADO
Black Transfer & Storage Company

FORT SMITH
Arkansas Warehouse Co.
O. K. Transfer & Storage Co.

LITTLE ROCK
Commercial Warehouse Co.
Merchants Transfer & Warehouse Co.
Terminal Warehouse Co.

TEXARKANA
Hunter Transfer & Storage Co.

LOUISIANA

ALEXANDRIA
Carnahan's Transfer & Storage Co.
Trousdale, Wright & Keller, Inc.

BATON ROUGE
S. A. Harris Transfer & Stge. Co., Inc.
Port of Baton Rouge, Municipal Docks, Term. & Whse.

LAKE CHARLES
United Whse. & Forwarding Co., Inc.

MONROE
W. M. Black & Company
Faulk-Collier Bonded Warehouses, Inc.
Monroe Transfer & Whse. Co., Inc.
Trousdale & Wright, Inc.

NEW ORLEANS
Acme Warehouses
Appalachian Warehouses
Army Base Unit No. 2, Douglas Shipside Storage Corp.
Bienville Warehouse Corporation
Commercial Terminal Warehouse Co.
Cottam Block Warehouse
Dietrich & Wiltz, Inc.

LOUISIANA (Continued)

NEW ORLEANS (Continued)
Douglas Public Service Corp.
Douglas Shipside Storage Corp.
Gough Brokerage Company, Inc.
Importers Bonded Warehouse Company
Independent Warehouse Co., Inc.
Kentucky Coffee Warehouse Co.
Maloney Trucking & Storage, Inc.
New Orleans Compress Company, Inc.
Orleans Warehouses Corp., Inc.
Pelican Storage & Transfer Company
Rebecca-Fabacher, Inc.
Riverside Warehouses, Inc.
Shipside Storage Co., Inc.
Standard Warehouse Co., Inc.

SHREVEPORT
Caddo Transfer & Warehouse Co., Inc.
Herrin Transfer & Warehouse Co., Inc.
McGee Warehouse & Storage Co.
O. K. Storage & Van Co., Inc.
Terminal Warehouse & Trf. Co., Inc.

NEW MEXICO

ALBUQUERQUE
Shufflebarger Transfer & Storage Co., Inc.
Springer Transfer Co., Inc.

OKLAHOMA

ADA
Couch Transfer & Storage Co.

CHICKASHA
Painter Transfer & Storage Co.

CLINTON
Clinton Transfer & Storage Co.

GUTHRIE
A. R. Davis Transfer & Storage Company
Fairfield Transfer Company

220 **OKLAHOMA (Continued)**

MUSKOGEE
Muskogee Transfer & Storage Co.

OKLAHOMA CITY
Commercial Warehouse Co.
O. K. Transfer & Storage Co.
Oklahoma Bonded Warehouse
The Public Warehouse Co.
Red Ball, Inc.
Reliable Van & Warehouse Co.

TULSA
Federal Van & Storage Company
Joe Hedges Fireproof Warehouses
Nichols Transfer & Storage Co.
Tulsa Terminal Storage & Transfer Co.

TEXAS

ABILENE
Abilene Storage Co.
J. D. Moore Transfer & Storage Co.
W. T. Wilson Transfer & Storage Co.

AMARILLO
Amarillo Warehouse Co.
American Warehouse & Storage Co.
Armstrong Transfer & Storage Co., Inc.
Bishop Warehouse & Storage Co.
M. & L. Transfer & Storage Co.
McKnight Transfer, Livery & Sales Co.

AUSTIN
Central Forwarding, Incorporated
Merchants Transfer & Storage Co.
Patton's, Inc. Operating as Patton Transfer Co.
Scobey Fireproof Storage Co.

BEAUMONT
Heisig Storage & Transfer Co.
Terminal Warehouse & Storage Co.

BROWNSVILLE
Jones Transfer & Storage Co.

CORPUS CHRISTI
Corpus Christi Transfer Co., Inc.
Corpus Christi Whse. & Storage Co.
Crocker Transfer & Storage Co.
Lone Star Warehouse & Storage
State Bonded Warehouse Co.

CORSICANA
Corsicana-Trinity Warehouse Co.

DALLAS
Ahart Van & Storage Company
American Transfer & Storage Co.
Binyon-O'Keefe Fireproof Storage Co.
Central Forwarding Co., Inc.
Dallas Transfer & Terminal Whse. Co.
Dallas-Trinity Warehouse Co.
Gillette Transfer & Storage Co.
Inter-State Fireproof Stge. & Transfer Co.
Koon-McNatt Storage & Transfer Co.
Merchants Cold Storage Co.
Morgan Warehouse & Commercial Co.
Preston Warehouse
Service Warehouse Co.
Shannon Warehouse Service
The Shippers Warehouse Co.
Sproles Transfer & Storage Co.

TEXAS (Continued)

FORT WORTH (Continued)
Fort Worth Warehouse & Storage Co.
O. K. Warehouse Co., Inc.
Sproles Transfer & Storage Co.
Texas & Pacific Terminal Whse. Co.

GALVESTON
Cotton Concentration Company, Inc.
John W. Focke Distributors Warehouse
Moon Brothers, Inc.
Wald Transfer & Storage Company
Wiley & Nicholls Co.

HARLINGEN
Jones Transfer & Storage Co.

HOUSTON
American Bonded Warehouse Co.
Buffalo Warehouse Co.
Central Forwarding Company, Inc.
J. M. David
Herrin Transfer & Warehouse Co.
Houston Central Warehouse Co., Inc.
Houston Compresa
Houston Port Warehouse Co.
Houston Terminal Whse. & Cold Stge. Co.
Houston Transfer Company, Inc.
E. A. Hudson Transfer & Warehouse Co., Inc.
Manchester Terminal Corp.
Patrick Transfer & Storage Co.
Port Warehouse & Forwarding Co.
Texas Port City Stge. & Trans. Co., Inc.
Texas Warehouse Co.
The Tidewater Warehouse Co., Inc.
Union Transfer & Storage Co.
Universal Terminal Warehouse Co.
Wald Transfer & Storage Co.
Westheimer Transfer & Storage Co.

LAREDO
J. C. Netzer Company

LUBBOCK
Armstrong Transfer & Storage Co., Inc.
Lubbock Transfer & Storage Company

McALLEN
Jones Transfer & Storage Co.
McAllen Transfer & Storage Co.

PARIS
Paris Transfer & Storage Co.

PLAINVIEW
Plainview Warehouse & Storage Co.

PORT ARTHUR
J. Imhoff & Sons

SAN ANGELO
San Angelo Transfer Co.

SAN ANTONIO
Central Forwarding Company, Inc.
Central Warehouse & Storage Co., Inc.
Linnartz & Frey, Inc.
Merchants Transfer & Storage Co.
Muegge-Jenull Warehouse Co.
Scobey Fireproof Storage Co.
Security Bonded Warehousing Co.
Southern Transfer Co., Inc.
State Bonded Warehouse Co.

SWEETWATER
Sweetwater Transfer Co.

Nichols Transfer & Storage Co.
Tulsa Terminal Storage & Transfer Co.

TEXAS

ABILENE
Abilene Storage Co.
J. D. Moore Transfer & Storage Co.
W. T. Wilson Transfer & Storage Co.

AMARILLO
Amarillo Warehouse Co.
American Warehouse & Storage Co.
Armstrong Transfer & Storage Co., Inc.
Bishop Warehouse & Storage Co.
M. & L. Transfer & Storage Co.
McKnight Transfer, Livery & Sales Co.

AUSTIN
Central Forwarding, Incorporated
Merchants Transfer & Storage Co.
Patton's, Inc. Operating as Patton Transfer Co.
Scobey Fireproof Storage Co.

BEAUMONT
Heisig Storage & Transfer Co.
Terminal Warehouse & Storage Co.

BROWNSVILLE
Jones Transfer & Storage Co.

CORPUS CHRISTI
Corpus Christi Transfer Co., Inc.
Corpus Christi Whse. & Storage Co.
Crocker Transfer & Storage Co.
Lone Star Warehouse & Storage
State Bonded Warehouse Co.

CORSICANA
Corsicana-Trinity Warehouse Co.

DALLAS
Ahart Van & Storage Company
American Transfer & Storage Co.
Binyon-O'Keefe Fireproof Storage Co.
Central Forwarding Co., Inc.
Dallas Transfer & Terminal Whse. Co.
Dallas-Trinity Warehouse Co.
Gillette Transfer & Storage Co.
Inter-State Fireproof Stge. & Transfer Co.
Koon-McNatt Storage & Transfer Co.
Merchants Cold Storage Co.
Morgan Warehouse & Commercial Co.
Preston Warehouse
Service Warehouse Co.
Shannon Warehouse Service
The Shippers Warehouse Co.
Sproles Transfer & Storage Co.

EDINBURG
Jones Transfer & Storage Co.

EL PASO
Achterberg Warehouse Co.
El Paso Fireproof Storage Co.
International Warehouse Co., Inc.
Charles G. Schnaibel Warehouse
Security Fireproof Storage Co.

FORT WORTH
Binyon-O'Keefe Fireproof Storage Co.
Central Forwarding Company, Inc.
Fort Worth Distributing Co.
Ft. Worth-Trinity Warehouse Co.

Jones Transfer & Storage Co.

HOUSTON
American Bonded Warehouse Co.
Buffalo Warehouse Co.
Central Forwarding Company, Inc.
J. M. David
Herrin Transfer & Warehouse Co.
Houston Central Warehouse Co., Inc.
Houston Compress
Houston Port Warehouse Co.
Houston Terminal Whse. & Cold Stge. Co.
Houston Transfer Company, Inc.
E. A. Hudson Transfer & Warehouse Co., Inc.
Manch ster Terminal Corp.
Patric Transfer & Storage Co.
Port arehouse & Forwarding Co.
Texas Port City Stge. & Trans. Co., Inc.
Texas Warehouse Co.
The Tidewater Warehouse Co., Inc.
Union Transfer & Storage Co.
Universal Terminal Warehouse Co.
Wald Transfer & Storage Co.
Westheimer Transfer & Storage Co.

LAREDO
J. C. Netzer Company

LUBBOCK
Armstrong Transfer & Storage Co., Inc.
Lubbock Transfer & Storage Company

McALLEN
Jones Transfer & Storage Co.
McAllen Transfer & Storage Co.

PARIS
Paris Transfer & Storage Co.

PLAINVIEW
Plainview Warehouse & Storage Co.

PORT ARTHUR
J. Imhoff & Sons

SAN ANGELO
San Angelo Transfer Co.

SAN ANTONIO
Central Forwarding Company, Inc.
Central Warehouse & Storage Co., Inc.
Linnarts & Frey, Inc.
Merchants Transfer & Storage Co.
Muegge-Jenull Warehouse Co.
Scobey Fireproof Storage Co.
Security Bonded Warehousing Co.
Southern Transfer Co., Inc.
State Bonded Warehouse Co.

SWEETWATER
Sweetwater Transfer Co.

TYLER
Tarry Transfer & Storage Company
Tyler Warehouse & Transfer Co.

WACO
Central Forwarding, Inc.
Eubank Brokerage Company
Sproles Transfer & Storage Co.
Texas Fireproof Storage Co.
Turner Brothers Brokerage Company

WICHITA FALLS
Albright Transfer & Storage Company
Elkin Transfer & Storage Company
Sproles Transfer & Storage Co.
Tarry Warehouse & Storage Co., Inc.

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REGION 8

COLORADO

ALAMOSA
W. A. Jones Transfer Co.

COLORADO SPRINGS
The Pikes Peak Warehousing Co.
The Wandell & Lowe Tri. & Stge. Co.

DENVER
Amick Transfer & Storage Company
Bankers Warehouse Co.
Colorado Warehouse Co.
Duffy Storage & Moving Co.
C. Paul Harrington
Kennicott Patterson Warehouse Corp.
Merchants Storage & Transfer Company
Morgan Transfer & Storage Co.
Morris Warehouse Co.
North Denver Transfer & Storage Co.
Rocky Mountain Warehouse Company
Security Storage Co., Inc.
United States Transfer & Storage Warehouse Co.
Weicker Transfer & Storage Co.

GRAND JUNCTION
J. W. Milne Transfer & Storage
E. W. Terrill Transfer & Storage

GREELEY
Union Delivery Company

LONGMONT
Golden Transfer Company

LOVELAND
Gateway Coal & Transfer Company

PUEBLO
Burch Warehouse & Transfer Co.

IDAHO

BOISE
Boise Cold Storage Company
Compton Transfer and Storage Company
Idaho Distributors, Inc.
Peasley Transfer & Storage Co.

LEWISTON
Eagle Transfer & Storage Co.
Star Dray & Transfer Co.

POCATELLO
Garrett Transfer & Storage Co., Inc.
Jennings-Cornwall Warehouses, Inc.

TWIN FALLS
Garrett Transfer & Storage Co., Inc.

OREGON

EUGENE
Pacific Transfer & Storage Co.
Security Warehouse & Storage Company

KLAMATH FALLS

COLORADO (Continued)

TRINDAD
Couey Storage & Transfer
Pople Transfer & Storage Company

WALSENBURG
Jellison Transfer & Storage Company

UTAH

OGDEN
Interstate Terminal Warehouse Co., Inc.
Western Gateway Storage Co.

SALT LAKE CITY
Central Warehouse
Dooly Terminal Warehouse
Hadley Transfer & Storage Co.
Jennings-Cornwall Warehouse Co.
M. A. Keyser Fireproof Storage Co.
Korns Warehouse Co.
Redman Van & Storage Co.
Security Storage & Commission Co.

WYOMING

CASPER
Casper Transfer & Storage Company
Castledine Transfer & Storage Company
Head Warehouse
Merchants Warehouse & Transfer Company
Natrona Transfer & Storage Company

CHEYENNE
Barlow Brothers Transfer Company
Cheyenne Transfer & Storage Co.

SHERIDAN
Church Warehouse Company

REGION 9

OREGON (Continued)

PORTLAND (Continued)
Manning Warehouse & Transfer Co.
Miers & Bockenfeld, Incorporated
Northwestern Transfer Co.
Olsen-Roe Transfer Co.
Oregon Auto Despatch
Oregon Transfer Company
Pacific Storage & Delivery Company
Pacific Transfer & Storage Company, Inc.
Package Delivery Co.
T. E. Pearson Storage Company
Pihl Transfer & Storage Co.
Portland Auto Delivery Co.
Rapid Transfer & Storage Co., Inc.
Rudie Wilhelm Warehouse Co., Inc.
Sills Truck Service, Incorporated
Weeks Company, Transfer.

ROSEBURG
H. S. French Transfer & Storage Co.

WASHINGTON

ABERDEEN
A. A. Star Transfer Co.

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REGION 8

COLORADO

ALAMOSA
W. A. Jones Transfer Co.

COLORADO SPRINGS
The Pikes Peak Warehousing Co
The Wandell & Lowe Trf. & Stge. Co.

DENVER
Amick Transfer & Storage Company
Bankers Warehouse Co.
Colorado Warehouse Co.
Duffy Storage & Moving Co.
C. Paul Harrington
Kennicott Patterson Warehouse Corp.
Merchants Storage & Transfer Company
Morgan Transfer & Storage Co.
Morris Warehouse Co.
North Denver Transfer & Storage Co.
Rocky Mountain Warehouse Company
Security Storage Co., Inc.
United States Transfer & Storage Warehouse Co.
Weicker Transfer & Storage Co.

GRAND JUNCTION
J. W. Milne Transfer & Storage
E. W. Terrill Transfer & Storage

GREELEY
Union Delivery Company

LONGMONT
Golden Transfer Company

LOVELAND
Gateway Coal & Transfer Company

PUEBLO
Burch Warehouse & Transfer Co.

COLORADO (Continued)

TRINDAD
Couey Storage & Transfer
Pople Transfer & Storage Company

WALSENBURG
Jellison Transfer & Storage Company

UTAH

OGDEN
Interstate Terminal Warehouse Co., Inc.
Western Gateway Storage Co.

SALT LAKE CITY
Central Warehouse
Dooly Terminal Warehouse
Hadley Transfer & Storage Co.
Jennings-Cornwall Warehouse Co.
M. A. Keyser Fireproof Storage Co.
Kohns Warehouse Co.
Redman Van & Storage Co.
Security Storage & Commission Co.

WYOMING

CASPER
Casper Transfer & Storage Company
Castledine Transfer & Storage Company
Head Warehouse
Merchants Warehouse & Transfer Company
Natrona Transfer & Storage Company

CHEYENNE
Barlow Brothers Transfer Company
Cheyenne Transfer & Storage Co.

SHERIDAN
Church Warehouse Company

REGION 9

IDAHO

BOISE
Boise Cold Storage Company
Compton Transfer and Storage Company
Idaho Distributors, Inc.
Peasley Transfer & Storage Co.

LEWISTON
Eagle Transfer & Storage Co.
Star Dray & Transfer Co.

POCATELLO
Garrett Transfer & Storage Co., Inc.
Jennings-Cornwall Warehouses, Inc.

TWIN FALLS
Garrett Transfer & Storage Co., Inc.

OREGON

EUGENE
Pacific Transfer & Storage Co.
Security Warehouse & Storage Company

KLAMATH FALLS
Peoples Warehouse

OREGON (Continued)

PORTLAND (Continued)
Manning Warehouse & Transfer Co.
Miers & Bockenfeld, Incorporated
Northwestern Transfer Co.
Olsen-Roe Transfer Co.
Oregon Auto Despatch
Oregon Transfer Company
Pacific Storage & Delivery Company
Pacific Transfer & Storage Company, Inc.
Package Delivery Co.
T. E. Pearson Storage Company
Pihl Transfer & Storage Co.
Portland Auto Delivery Co.
Rapid Transfer & Storage Co., Inc.
Rudie Wilhelm Warehouse Co., Inc.
Sills Truck Service, Incorporated
Weeks Company, Transfer

ROSEBURG
H. S. French Transfer & Storage Co.

WASHINGTON

ABERDEEN
A. A. Star Transfer Co.

Bankers Warehouse Co.
Colorado Warehouse Co.
Duffy Storage & Moving Co.
C. Paul Harrington
Kennicott Patterson Warehouse Corp.
Merchants Storage & Transfer Company
Morgan Transfer & Storage Co.
Morris Warehouse Co.
North Denver Transfer & Storage Co.
Rocky Mountain Warehouse Company
Security Storage Co., Inc.
United States Transfer & Storage Warehouse Co.
Weicker Transfer & Storage Co.

GRAND JUNCTION
J. W. Milne Transfer & Storage
E. B. Terrill Transfer & Storage

GREELEY
Union Delivery Company

LONGMONT
Golden Transfer Company

LOVELAND
Gateway Coal & Transfer Company

PUEBLO
Burch Warehouse & Transfer Co.

IDAHO

BOISE
Boise Cold Storage Company
Compton Transfer and Storage Company
Idaho Distributors, Inc.
Peasley Transfer & Storage Co.

LEWISTON
Eagle Transfer & Storage Co.
Star Dray & Transfer Co.

POCATELLO
Garrett Transfer & Storage Co., Inc.
Jennings-Cornwall Warehouses, Inc.

TWIN FALLS
Garrett Transfer & Storage Co., Inc.

OREGON

EUGENE
Pacific Transfer & Storage Co.
Security Warehouse & Storage Company

KLAMATH FALLS
Peoples Warehouse

PENDLETON
Fenland Bros. Transfer Co.

PORTLAND
Alert Transfer & Storage Co.
Baggage & Omnibus Transfer Co.
Colonial Warehouse & Transfer Co.
Crescent Transfer & Warehouse Company
Haslett Warehouse Company
Helser Bros. Transfer Co.
Holman Transfer Co.
Hunt Transfer Co., Inc.
Lyon Van & Storage Co.

OGDEN
Interstate Terminal Warehouse Co., Inc.
Western Gateway Storage Co.

SALT LAKE CITY
Central Warehouse
Dooly Terminal Warehouse
Hadley Transfer & Storage Co.
Jennings-Cornwall Warehouse Co.
M. A. Keyser Fireproof Storage Co.
Korns Warehouse Co.
Redman Van & Storage Co.
Security Storage & Commission Co.

WYOMING

CASPER
Casper Transfer & Storage Company
Castledine Transfer & Storage Company
Head Warehouse
Merchants Warehouse & Transfer Company
Natrona Transfer & Storage Company

CHEYENNE
Barlow Brothers Transfer Company
Cheyenne Transfer & Storage Co.

SHERIDAN
Church Warehouse Company

REGION 9

OREGON (Continued)

PORTLAND (Continued)
Manning Warehouse & Transfer Co.
Miers & Boekenfeld, Incorporated
Northwestern Transfer Co.
Olsen-Roe Transfer Co.
Oregon Auto Despatch
Oregon Transfer Company
Pacific Storage & Delivery Company
Pacific Transfer & Storage Company, Inc.
Package Delivery Co.
T. E. Pearson Storage Company
Pihl Transfer & Storage Co.
Portland Auto Delivery Co.
Rapid Transfer & Storage Co., Inc.
Rudie Wilhelm Warehouse Co., Inc.
Sills Truck Service, Incorporated
Weeks Company, Transfer

ROSEBURG
H. S. French Transfer & Storage Co.

WASHINGTON

ABERDEEN
A. A. Star Transfer Co.

BELLINGHAM
Freeman Transfer
Pacific Highway Transport

EVERETT
Pacific Highway Transport

HOQUIAM
Grayport Transfer & Storage Company

OLYMPIA
Olympia Warehouse & Distr. Company

PULLMAN
Auto Transfer & Storage

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WASHINGTON (Continued)

SEATTLE
A. B. C. Storage Co.
Acme Cartage Company, Incorporated
American Warehouse Co.
C. & N. Transfer & Storage Company
Christie-Lambert Van & Storage Co., Inc.
City Transfer & Storage Co.
Eyres Transfer & Warehouse Co.
Fortune Transfer Company
Hullin Transfer Co.
Merchants Transfer & Storage Co.
Olympic Warehouse & Cold Storage Co.
Owl Transfer & Storage Co.
Pike Warehouse Company
Reliable Transfer & Storage Co.
Seattle Transfer & Storage Co.
Standard Warehouse Company
System Transfer & Storage Co.
Taylor-Edwards Whse. & Transfer Co., Inc.
Transport Storage & Distributing Company
United Warehouse Co.
Van Waters & Rogers, Inc.
Winn & Russell, Inc.

SPOKANE
Beardmore Transfer Line Corp.
Cater Transfer & Storage Co.
Goodwin Transfer & Storage Co.
Grimmer Storage & Truck Line, Inc.

WASHINGTON (Continued)

SPOKANE (Continued)
Kelly Clarke Company
McAllister Warehouse Co., Inc.
National Storage & Warehouse Co.
Pacific Transfer Co.
Riverside Warehouse
Spokane Transfer & Storage Co.

TACOMA
Acme Transfer & Storage Company, Inc.
Kenworthy Grain & Milling Company
McLean the Mover, Incorporated
Pacific Highway Transport
Pacific Storage Whse. & Distr. Co., Inc.
Star Commercial Moving & Storage Co.
Tacoma Moving & Storage Co.

WALLA WALLA
Bryant Transfer
Maskelyne Brothers Transfer & Storage

WENATCHEE
Arrow Transfer & Storage Co.
Eagle Livery & Transfer Company, Inc.
Wenatchee Auto Express

YAKIMA
Redmon-Fairchild, Incorporated
Yakima Transfer & Storage Company

REGION 10

ARIZONA

PHOENIX
Arrow Van & Storage Co.
Central Transfer & Storage Company
Chambers Transfer & Storage Co.
Lightning Delivery Co.

PRESCOTT
Prescott Transfer & Storage Company

TUCSON
Citizens Transfer & Storage Company, Inc.
Tucson Warehouse & Transfer Co.

CALIFORNIA

BERKELEY
Bekins Van & Storage Company

BEVERLY HILLS
Bekins Van & Storage Company

FRESNO
Bekins Van & Storage Co.
State Center Warehouse & Cold Storage Co., Inc.
Terminal Warehouse Co.

GLENDALE
Bekins Van & Storage Company

HOLLYWOOD
Hollywood Storage Company, Inc.

LONG BEACH
City Transfer & Storage Co.
Lyon Van & Storage Company

CALIFORNIA (Continued)

LOS ANGELES (Continued)
H. & J. Truck Company
Jennings-Nibley Warehouse Co., Ltd.
F. C. Johnson
Los Angeles Brewing Co.
Los Angeles Warehouse Co.
Metropolitan Warehouse Co.
Modern Warehouses, Inc.
Overland Terminal Warehouse Co.
Pacific Coast Terminal Warehouse Co.
Pacific Commercial Warehouse Company
Pacific Transportation & Warehouse Co.
Richards Trucking & Warehouse Company
Seaboard Warehouse
Smith Brothers Truck Company
Star Truck & Warehouse Co.
Union Terminal Warehouse
Western Warehouse & Transfer Co.
Westland Warehouses, Inc.

LOS ANGELES HARBOR
City & Harbor Warehouse, Ltd.
Crescent Warehouse Co.
Wilmington Transfer & Storage Co.

OAKLAND
Bekins Van & Storage Company
The Haslett Warehouse Co.
Howard Terminal
Oakland Warehouse Terminals, Div. of Merchants Exp. & Draying Co.

PASADENA
Bekins Van & Storage Company

RICHMOND

System Transfer & Storage Co.
Taylor-Edwards Whse. & Transfer Co., Inc.
Transport Storage & Distributing Company
United Warehouse Co.
Van Waters & Rogers, Inc.
Winn & Russell, Inc.

SPOKANE
Beardmore Transfer Line Corp.
Cater Transfer & Storage Co.
Goodwin Transfer & Storage Co.
Grimmer Storage & Truck Line, Inc.

WALLA WALLA
Bryant Transfer
Maskelyne Brothers Transfer & Storage

WENATCHEE
Arrow Transfer & Storage Co.
Eagle Livery & Transfer Company, Inc.
Wenatchee Auto Express

YAKIMA
Redmon-Fairchild, Incorporated
Yakima Transfer & Storage Company

REGION 10

ARIZONA

PHOENIX
Arrow Van & Storage Co.
Central Transfer & Storage Company
Chambers Transfer & Storage Co.
Lightning Delivery Co.

PRESCOTT
Prescott Transfer & Storage Company

TUCSON
Citizens Transfer & Storage Company, Inc.
Tucson Warehouse & Transfer Co.

CALIFORNIA

BERKELEY
Bekins Van & Storage Company

BEVERLY HILLS
Bekins Van & Storage Company

FRESNO
Bekins Van & Storage Co.
State Center Warehouse & Cold Storage Co., Inc.
Terminal Warehouse Co.

GLENDALE
Bekins Van & Storage Company

HOLLYWOOD
Hollywood Storage Company, Inc.

LONG BEACH
City Transfer & Storage Co.
Lyon Van & Storage Company
Pacific & Orient Dock

LOS ANGELES
American Warehouse
Bekins Van Lines, Inc.
Birch-Smith Storage Co.
California Warehouse Co.
Central Warehouse & Storage Company
H. G. Chaffee Warehouse Co.
Citizens Warehouse
J. A. Clark Draying Company, Ltd.
Colyear's Van & Storage Co.
Cook-McFarland Co.
Davies Warehouse Co.
G. Eckdahl & Son Warehouse Co.
Farmers Grain & Milling Company

CALIFORNIA (Continued)

LOS ANGELES (Continued)
H. & J. Truck Company
Jennings-Nibley Warehouse Co., Ltd.
F. C. Johnson
Los Angeles Brewing Co.
Los Angeles Warehouse Co.
Metropolitan Warehouse Co.
Modern Warehouses, Inc.
Overland Terminal Warehouse Co.
Pacific Coast Terminal Warehouse Co.
Pacific Commercial Warehouse Company
Pacific Transportation & Warehouse Co.
Richards Trucking & Warehouse Company
Seaboard Warehouse
Smith Brothers Truck Company
Star Truck & Warehouse Co.
Union Terminal Warehouse
Western Warehouse & Transfer Co.
Westland Warehouses, Inc.

LOS ANGELES HARBOR
City & Harbor Warehouse, Ltd.
Crescent Warehouse Co.
Wilmington Transfer & Storage Co.

OAKLAND
Bekins Van & Storage Company
The Haslett Warehouse Co.
Howard Terminal
Oakland Warehouse Terminals, Div. of Merchants Exp. & Draying Co.

PASADENA
Bekins Van & Storage Company

RICHMOND
Parr-Richmond Terminal Corp., Ltd.

SACRAMENTO
Bekins Van & Storage Company
Haslett Warehouse Co.
Lawrence Warehouse & Distributing Company
Western Van & Storage Company

SAN BERNARDINO
Associated Warehouse & Truck Company, Inc.

SAN DIEGO
Bekins Van & Storage Company
Lyon Van & Storage Co.

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CALIFORNIA (Continued)

SAN FRANCISCO
A. B. C. Transfer & Storage Co.
Bekins Van & Storage Company
Blahaw Warehouse Co.
Central Warehouse & Drayage Co.
J. A. Clark Draying Co., Ltd.
De Pue Warehouse Co.
A. M. Devincenzi
Distributors Warehouse Co.
The Dodd Warehouses
J. Theo. Erlin Co.
Farnsworth & Ruggles
Haslett Warehouse Co.
The Johnson-Locke Mercantile Company
Charles F. Kane & Company
Lawrence Warehouse Co.
George W. Metlar Company, Inc.
Morgan & Samson Company
Frank Nolan Drayage & Warehouse Company
North Point Dock Warehouses
Parr-Richmond Terminal Corporation, Ltd.
San Francisco Warehouse Co.
Sea Wall U. S. Bonded Warehouse
South End Warehouse Co.
Souther Warehouse Company
Thompson Bros.
Charles Lee Tilden & Co.
Turner-Whittell Warehouses
Walkup Drayage & Warehouse Co.
Warehouse Service Company

CALIFORNIA (Continued)

SAN JOSE
James Transfer & Storage Co.
Security Warehouse & Cold Storage Co.

SAN PEDRO
Outer-Harbor Dock & Wharf Co.

SANTA BARBARA
Bekins Van & Storage Company
Lyon Van & Storage Company

STOCKTON
Haslett Warehouse Co.
Overland Transfer Co.

NEVADA

RENO
Nevada Transfer & Warehouse Co.
Pearl Upson & Son

663974 O - 45 (Face $ 206) No. 26

224 RAILROAD RETIREMENT BOARD

Proposed Decision

In the Matter of) Jurisdictional
Duquesne Warehouse Company) Docket No. 18

DECISION OF THE BOARD

Introductory

In order to enable determination of claims for annuities under the Railroad Retirement Act based in part upon service rendered to the Duquesne Warehouse Company, herein called Duquesne, the General Counsel, under duly delegated authority, ruled that Duquesne is an "employer" within the meaning of the Railroad Retirement Act and that, consequently, service rendered to it from August 1, 1906, the date of its incorporation, to date, is creditable toward annuities under that Act. General Counsel's Opinion on *Duquesne Warehouse Company*, May 23, 1939. The ruling of the General Counsel was based on Duquesne's response to the Board's Questionnaire Form LQ-2 (revised) which is contained in the record herein.

At a hearing on September 15, 1939 before Board Members Eddy and Reed, Duquesne protested the ruling of the General Counsel and submitted a memorandum in support of its position and a completed Board Questionnaire Form LQ-2-c.

Upon requests of counsel, Duquesne was allowed until February 15, 1940 to file further evidence and argu-
225 ment in support of its position that it is not an "employer" within the meaning of the Railroad Retirement Act. Duquesne filed, on February 14, 1940, a memorandum of law, and a statement of facts which is made part of the record herein.

The case is now before the Board for determination upon the questionnaire forms completed by Duquesne, Duquesne's memorandum filed on September 15, 1939, and Duquesne's statement of facts filed on February 14, 1940.

The issue presented in this case may be stated as follows:

Whether Duquesne, as a company directly and completely owned and controlled by the Pennsylvania Railroad

Company, herein called Pennsylvania, a carrier by railroad subject to Part I of the Interstate Commerce Act and an "employer" under the Railroad Retirement Act, is an "employer" under that Act because it is engaged in the non-casual operation of any equipment or facility or the performance of any non-casual service, other than trucking service, in connection with the transportation of property by railroad, or the receipt, delivery, transfer in transit, storage, or handling of property transported by railroad.

After careful consideration of the record herein, we make the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. Duquesne was caused by Pennsylvania to be incorporated on August 1, 1906, under the laws of the State of Pennsylvania. Since Duquesne's incorporation, it has been directly and completely owned and controlled, through stock ownership, by Pennsylvania.

226 2. Most of Duquesne's principal officers are also officers of Pennsylvania, the identity and positions of such common officers being, as of February 17, 1939, as follows:

Duquesne Office	Pennsylvania Office
E. W. Smith, President and Director	Vice President
W. S. Franklin, Director	Vice President
J. Toney Willcox, Secretary	Secretary
J. Gordon Watson, Assistant Secretary	Assistant Secretary
Geo. H. Papst, Jr., Treasurer	Assistant Vice President and Treasurer
H. W. Schotter, Assistant Treasurer	Assistant Treasurer
John Pemberton, Jr., Assistant Treasurer	Assistant Treasurer
F. J. Fell, Jr., Comptroller	Vice President and Comptroller
Elmer Hart, Assistant Comptroller	Deputy Comptroller
A. R. Meredith, Real Estate Agent	Real Estate Agent

3. Duquesne's operations are now and have been at least since August 28, 1935, intimately and integrally related to those of Pennsylvania. Duquesne has been primarily, principally and predominantly engaged in the storage, loading and unloading, and other handling of goods transported over the lines of Pennsylvania, being in substance an agency of Pennsylvania for such purposes.

4. The two warehouses operated by Duquesne, which are located at East Liberty and Pittsburgh, Pennsylvania, have been valuable links in the chain of Pennsylvania's railroad transportation. They are owned by Pennsylvania,

being operated by Duquesne under lease from Pennsylvania. A portion of the ground floor of each warehouse is retained by Pennsylvania and used and officially designated by it as its "freight agency." Duquesne's warehouses, as well as Pennsylvania's "freight agencies," are served by Pennsylvania's railroad tracks and are
227 equipped with platforms or sidings and other facilities for the receipt, delivery, and other handling of inbound and outbound freight.

5. At the East Liberty warehouse, Duquesne handles and stores only one commodity, carload sugar, which comes in and goes out over Pennsylvania's rails. The sugar is handled by Duquesne under storage-in-transit privileges permitted and covered by railroad tariffs filed by Pennsylvania with the Interstate Commerce Commission. Part of the sugar which passes through Duquesne's warehouse is refined in California and part in New York. That refined in California is moved by ship to one of the eastern ports, such as Philadelphia or Baltimore, and thence by rail to Pittsburgh; and that refined in New York is shipped by rail directly from New York to Pittsburgh. At Duquesne's warehouse, which is used as a distribution center, the packages of sugar are assembled in the proper numbers and sizes and then shipped out over Pennsylvania's lines for distribution. Incoming shipments are consigned to the owner care of Duquesne, the route being designated as "Penn R R—For Stge in Transit"; and outgoing shipments are consigned to the owner, the bill of lading having a transit record number and being marked "accorded transit privilege at East Liberty, Pa." Both the unloading of the sugar from, and its reloading into, Pennsylvania cars are performed by Duquesne at the latter's siding for the account of the shipper in accordance with the governing rail tariff (Consolidated Freight Classification No. 13) requiring owners to load and unload freight carried at carload rates. In the case of incoming sugar, delivery is made by Pennsylvania and receipt is taken by Duquesne when
Pennsylvania places the cars on Duquesne's siding,
228 and Duquesne then unloads. In the case of outgoing shipments, the empty cars are placed by Pennsylvania on Duquesne's siding and loaded by Duquesne, which then receives Pennsylvania's bill of lading. The handling and storage charges are billed by Duquesne directly against

the owners of the property and are paid by such owners.

6. At its Pittsburgh warehouse, Duquesne is primarily, principally and predominantly engaged in the handling of freight which has come in, or is destined for movement, over Pennsylvania's rails, or which has both come in and is going out over Pennsylvania's rails. Approximately 95 per cent of the commodities handled at that place, which commodities are diverse in character and are hauled in both carload and less-than-carload form, come in by rail, the remainder coming in by truck. The respective rail and truck percentages of the outgoing commodities are 60 and 40. The services performed by Duquesne at the Pittsburgh warehouse are similar to those at East Liberty insofar as carload freight is concerned, except that no sugar is handled. As to the less-than-carload freight, Duquesne, in addition to storing it, performs the handling involved in delivering it to and receiving it from Pennsylvania's platform. The loading and unloading of less-than-carload freight is performed by Pennsylvania at its platform. In the case of incoming less-than-carload shipments, the freight is unloaded by Pennsylvania from the cars to its platform and is delivered to and received by Duquesne on such platform. In the case of outgoing less-than-carload shipments, Duquesne delivers the freight onto Pennsylvania's platform; Pennsylvania then issues its bill of lading, loads the freight into the cars, and moves them out.

229 7. Duquesne also performed, during the period between August, 1937 and May, 1938, unloading, storing, and reloading services and other transit details at Erie, Pennsylvania, in connection with carload shipments of newspaper print entitled to storage-in-transit privileges under Pennsylvania's tariffs. Duquesne stands ready to resume its services at Erie when the need therefor arises.

8. Duquesne's position as an agency of Pennsylvania, available to provide such facilities and services as the latter requires, appears further from Duquesne's handling, reconditioning, and selling for Pennsylvania over freight, damaged refused freight, and damaged unclaimed freight under a contract entered into between the two companies on February 1, 1922. Pursuant to this contract Pennsylvania transports to Pittsburgh any freight it desires to be disposed of by Duquesne and Duquesne removes such freight to its warehouse after the payment to Pennsylvania

of all freight and other charges that may have accrued thereon. Out of the gross proceeds realized by it from each sale, Duquesne deducts a commission of ten per cent and any amounts paid by it for reconditioning, drayage, freight, and other charges and turns the balance over to Pennsylvania. If the owner of any unclaimed freight is ascertained prior to the sale of such freight, Duquesne delivers such freight, upon instructions from Pennsylvania, to the owner and receives from the owner such charges as Duquesne has paid to Pennsylvania. In the event that the gross proceeds of the sale of freight do not equal the expenses incurred by Duquesne, plus the ten per cent commission, Duquesne is credited with the difference. If any lot of freight becomes so worthless as to be unsalable, Duquesne dis-
230 poses of it in such manner as Pennsylvania directs.

When any freight is returned by Duquesne to Pennsylvania upon the latter's order, Duquesne is reimbursed only for the actual expenses incurred by it.

9. Duquesne's revenues for the years 1936 through 1938 are indicative of the substantial extent to which it has been engaged in functions and activities connected with Pennsylvania's railroad transportation:

	Storage and handling of freight under storage-in-transit privileges	Storage and handling of other freight (including freight coming in or going out, or both, over Pennsylvania's rails)	Sale of damaged merchandise	Subleasing of space to manufacturing concerns
1936	$ 59,570.40	$ 63,011.60	$ 8,599.00	$32,732.00
1937	39,230.93	91,545.99	11,409.00	24,967.00
1938	29,845.01	73,702.99	8,881.86	16,035.17
	$119,646.34	$228,260.58	$28,889.86	$73,734.17

10. In addition to the above revenue figures, the substantial extent to which Duquesne has been engaged in the handling of freight accorded storage-in-transit privileges may be stated in terms of space used. Of the total space used by Duquesne at its warehouses at East Liberty and Pittsburgh, approximately 30 per cent was devoted to the handling of freight accorded storage-in-transit privileges in 1936; approximately 12.5 per cent, in 1937; and approximately 12.5 per cent, in 1938. During the period of operation at Erie, all the space at that point was used for such freight.

11. All of Duquesne's operations are intermingled. Duquesne's employees are not assigned exclusively to any one operation but are frequently shifted from one class 231 of work to another. The extent to which personnel is required, however, for the various operations for the years 1936 through 1938, estimated on the basis of the approximate number of men required on a full-time basis to perform the work in such operations, is as follows:

	Storage and handling of freight under storage-in-transit privileges	Storage and handling of other freight (including freight coming in or going out, or both, over Pennsylvania's rails)	Sale of damaged merchandise	Subleasing of space to tenants
1936	28	30	3	4
1937	14	42	3	4
1938	14	42	3	4
	55	114	9	12

12. Duquesne's operations are, and have been at least since August 28, 1935, integrally related to Pennsylvania's railroad transportation, being reasonably directly related, functionally and economically, to the performance of the transportation obligations which Pennsylvania has undertaken as a common carrier by railroad, and to the receipt, delivery, transfer in transit, storage, and handling of property transported by Pennsylvania by railroad.

13. Duquesne is, and has been at least since August 28, 1935, engaged in the non-casual operation of equipment and facilities and the performance of non-casual service in connection with Pennsylvania's transportation of property by railroad, other than trucking service, and the receipt, delivery, transfer in transit, storage, and handling of property transported by Pennsylvania by railroad.

232 CONCLUSIONS OF LAW

1. Duquesne is now, and has been at least since August 28, 1935, an "employer" within the meaning of Section 1(a) of the Railroad Retirement Act as a company directly owned and controlled by a "carrier employer" under the Act and engaged in the non-casual operation of equipment and facilities and the performance of non-casual services

in connection with the transportation of property by railroad, other than trucking service, and the receipt, delivery, transfer in transit, storage, and handling of property transported by railroad.

2. Service rendered to Duquesne from August 1, 1906, the date of its incorporation, to date, is creditable under the Railroad Retirement Act.

OPINION

It is undisputed that since its incorporation, Duquesne has been directly and completely owned and controlled, through stock ownership, by Pennsylvania. Therefore, the only issue here is whether Duquesne is engaged in the non-casual operation of equipment or facilities or the performance of non-casual service in connection with the transportation of property by railroad, or the receipt, delivery, transfer in transit, storage, or handling of property transported by railroad, within the meaning of Section 1(a) of the Railroad Retirement Act and Section 202.7 of the Regulations (20 Code Fed. Regs. 856.)[1]

233 That Duquesne is so engaged follows from our ruling of February 21, 1939, B.O. No. 39-84, that the Baltimore Fidelity Warehouse Company, a company operating a terminal warehouse business at points adjacent to freight terminals of the Baltimore and Ohio Railroad Company and storing goods which have been transported or are awaiting transportation by railroad, is an "employer" under the Railroad Retirement Act;[2] and from a number of decisions

[1] Although our information contains some facts with respect to the question of whether the individuals engaged in the performance of Duquesne's work are "employees" of Pennsylvania within the meaning of the Act as subject to the continuing authority of Pennsylvania to supervise and direct the manner of rendition of their compensated service, it is unnecessary to make any determination with respect to such issue in view of our conclusion that Duquesne is itself an "employer".

[2] In this connection, it may be noted that Duquesne does not question the validity of the Board's ruling in the *Baltimore Fidelity* case, but seeks rather to distinguish the *Baltimore Fidelity Warehouse Company* case from the present one on the ground that Baltimore Fidelity, in addition to its warehousing activities, solicited freight as agent for its controlling carrier. Duquesne also urges that, unlike the employees of Baltimore Fidelity, Duquesne's employees do not receive free transportation from Pennsylvania and are not subject to Pennsylvania's medical rules. Although the situation as to its employees and its minor activity of freight solicitation served to emphasize the intimate relationship between Baltimore Fidelity and its controlling carrier, the determinative factor in that case was that Baltimore Fidelity, under conditions of a close operating relationship with its parent carrier, has been engaged in the storage of goods which, for the most part, have been transported or are awaiting transportation over the lines of its parent carrier.

following that ruling. See opinions on *Lackawanna Terminal Warehouses, Inc.*, July 8, 1939; *Bush Terminal Company*, August 23, 1939; *B. R. & P. Warehouse, Inc.*, September 16, 1939; *Terminal Storage Company of Washington*, December 15, 1939.

234 Counsel for Duquesne contend that Section 1(a) of the Railroad Retirement Act is limited in scope to those services which constitute "transportation" as defined in Section 1(3) of the Interstate Commerce Act. This is a contention, long since rejected in over one hundred precedents settled in Board administration of the Railroad Retirement and Railroad Unemployment Insurance Acts. The fallacies which underlie such a contention are thoroughly discussed in our decisions in *Lenoir Car Works*, May 6, 1939, B. O. 39-291; and *Union Pacific Coal Co.*, May 31, 1940, B. O. 40-299. That discussion need not be repeated here. No reason is presented for upsetting years of administration and for calling into question large annuity obligations now in force under many Board precedents which, we have no doubt, were rightly decided.

Yet resurrection of that academic issue cannot obscure its irrelevance here, for Duquesne is engaged in many services which clearly do constitute "transportation" as that term is defined in Section 1(3) of the Interstate Commerce Act. Duquesne loads and unloads railroad cars. Such loading and unloading have repeatedly been recognized as direct and important elements of railroad transportation (*Baltimore and Ohio Southwestern Railroad Co.* v. *Burtch*, 263 U. S. 540, 544 (1924); *Atchison, Topeka & Santa Fe Railway Co.* v. *United States*, 295 U. S. 193, 198 (1935); *Loading and Unloading Carload Freight*, 101 I.C.C. 394 (1925)), and have been held to constitute "transportation" as defined in Section 1(3) of the Interstate Commerce Act. *Adams* v. *Mills*, 286 U. S. 397; *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501; *Haberman* v. *Pennsylvania R. Co.*, 234 I.C.C. 167, 173; *Loading and Unloading Carload Freight*, 101 I.C.C. 394; *McCormick*
235 *Warehouse Co.* v. *P. R.R. Co.*, 95 I.C.C. 301. As stated in our findings, Duquesne receives, delivers, and handles property transported by railroad and performs services in connection therewith. The language as to "receipt," "delivery" and "handling" in the Retirement Act and the Interstate Commerce Act is identical. Duquesne's activi-

ties in receipt, delivery and handling of property transported by railroad are plainly within the definitions of both Acts. Finally, Duquesne is also extensively engaged in performing storage-in-transit of goods transported by Pennsylvania and allowed that transit privilege under Pennsylvania's tariffs. Such storage is within the definition of "transportation" in Section 1(3) of the Interstate Commerce Act. *American Warehousemen's Association* v. *Inland Waterways Corporation*, 188 I.C.C. 13; *Storage in Transit at New Haven, Conn.*, 190 I.C.C. 209; *Storage at New London and Thamesville, Conn.*, 190 I.C.C. 213; *Propriety of Operating Practices—New York Warehousing*, 220 I.C.C. 102, 103, aff'd *Baltimore & Ohio R.R. Co.* v. *United States*, 305 U. S. 507.

Counsel for Duquesne earnestly urge that the services performed by Duquesne are not within the definition of "transportation" in Section 1(3) of the Interstate Commerce Act because Pennsylvania has not filed with the Interstate Commerce Commission and is not required to file a tariff embodying Duquesne's charges for such services. However it may be as to Pennsylvania's being under legal obligation to file such a tariff, the argument confuses definition with tariff coverage. It is settled that the definition of "transportation" in Section 1(3) of the Interstate Commerce Act includes services which a carrier may choose 236 to, but need not, perform. See *American Warehousemen's Association* v. *Inland Waterways Corporation*, *supra*, at p. 15; *McCormick Warehouse Co.* v. *P. R.R. Co.*, 95 I.C.C. 301. We are unable to find, and Duquesne presents, no plausible warrant for the assertion, implicit in its contention, that the coverage of services under Section 1(a) of the Retirement Act is limited not only to those services which are within the definition of "transportation" in Section 1(3) of the Interstate Commerce Act, but is limited even further to those services for which a carrier has filed a tariff. A program of social insurance to cover generally people engaged in railroad work could not depend, and clearly was not made by Congress to depend, upon the fortuitous choices and intricacies of tariff and rate procedures. The nature and substance of the services performed and not the choice of tariff procedures govern.[3]

[3] *Cf. New York Central R. R. Co.* v. *The Talisman*, 288 U. S. 239, 242 (1933); *Kansas City Southern Ry. Co.* v. *U. S.*, 282 U. S. 760, 764 (1931); *I. C. C.* v. *B. & O. R. R. Co.*, 225 U. S. 326, 345 (1912); *Southern Transportation Co.* v. *N. & W. Ry. Co.*, 101 I. C. C. 211, 221-222 (1925); *Atchison C. of C.* v. *Union Pacific R. R. Co.*, 196 I. C. C. 149 (1933).

Upon consideration of all cases and arguments submitted by counsel, it is found on the facts of this case that services performed by Duquesne are performed in connection with the transportation of property by railroad, and the receipt, delivery, transfer in transit, storage and handling of property transported by railroad within the meaning of those terms as they are defined in Section 1(a) of the Railroad Retirement Act, which section is controlling here, and as they are defined in Section 1(3) of the Interstate Commerce Act, which section Duquesne contends is controlling. It is held, therefore, there being no question that Pennsylvania owns and controls Duquesne, that Dequesne is and has been an "employer" within the meaning of the Railroad Retirement Act.

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This form is to be used only by the secretary of the Board or as otherwise specifically directed by the Board.	Form No. G-21 United States of America Railroad Retirement Board Transcript of Board Orders	Transcript No. Special Page 1 of 1 Page Date Transcript Released February 11, 1942

I certify that the following is a true and correct transcript of Board Order Numbered 42-63 transcribed from the Record of Proceedings of January 29, 1942.

JOHN DAVIDSON
Secretary of the Board

B.O. 42-63

ORDER

Allowing oral argument on the issue of whether Duquesne Warehouse Company is an "employer" under the Railroad Retirement Act.

1. The request of Mr. George R. Allen, Counsel for Duquesne Warehouse Company, for opportunity to present oral argument before the Board on the issue of whether Duquesne is an "employer" under the Railroad Retirement Act. Such argument shall be heard at the office of the Board, Tenth and U Streets, N. W., Washington, D. C., on March 10, 1942 at 10:00 a.m.

2. The secretary of the Board shall notify Counsel for Duquesne of the place and time for the hearing of argument and furnish him with copy of the existing draft of the proposed Board decision on the issue.

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GRAND LODGE
BROTHERHOOD OF RAILWAY AND
STEAMSHIP CLERKS,
Freight Handlers, Express and Station Employes
Brotherhood of Railway Clerks Building
Cincinnati, Ohio
Geo. M. Harrison
Grand President

File 282-42

Subject: Railroad Retirement Act—
Status of Duquesne Warehouse,
Pittsburgh—

Cincinnati, Ohio
February 10, 1942

Mr. Murray W. Latimer, Chairman,
Railroad Retirement Board,
Washington, D. C.

Dear Sir:

I understand that there is now before the Board the status of the Duquesne Warehouse, Pittsburgh.

The Brotherhood of Railway Clerks holds a contract covering these employees, and it is the Brotherhood's position that the company is subject to the Railroad Retirement and Railroad Unemployment Insurance Acts.

Will you please see that the Brotherhood is made a party to any proceedings involving the company and is given notice of hearing, argument, etc.

Very truly yours

GEO. M. HARRISON
Grand President

239

This form is to be used only by the secretary of the Board or as otherwise specifically directed by the Board.	Form No. G-21 United States of America Railroad Retirement Board Transcript of Board Orders	Transcript No. Special Page 1 of 1 Page Date Transcript Released

I certify that the following is a true and correct transcript of Board Order Numbered 42-93 transcribed from the Record of Proceedings of February 17, 1942

LORINE M. FISHER
Acting for the Secretary of the Board

B.O. 42-93

ORDER

Directing notification of the Brotherhood of Railway and Steamship Clerks of oral argument in Jurisdictional Docket No. 18, Duquesne Warehouse Company.

It having been shown that the Brotherhood of Railway and Steamship Clerks is an interested party in Jurisdictional Docket No. 18, Duquesne Warehouse Company, Board Order 42-63 is amended to provide that the secretary of the Board shall notify the Brotherhood of the time and place of the oral argument before the Board.

240 Feb 18 1942

Mr. Horace A. Bacus, Research Director
Brotherhood of Railway and Steamship Clerks
Room 701, Brotherhood of Railway Clerks Building
Cincinnati, Ohio

In the matter of Duquesne Warehouse Company
Jurisdictional Docket No. 18

Dear Sir:

Pursuant to the request of Mr. George R. Allen, Counsel for Duquesne Warehouse Company, the Board has authorized oral argument before it on the question whether Duquesne Warehouse Company is an "employer" under the Railroad Retirement Acts. The argument is to be held at the office of the Board, 10th and U Streets, N. W., Washington, D. C., on March 10, 1942, at 10:00 A. M. You may attend the oral argument and participate therein if you so desire.

Very truly yours,

JOHN C. DAVIDSON
Secretary of the Board

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This form is to be used only by the secretary of the Board or as otherwise specifically directed by the Board	Form No. G-21 United States of Ameriac Railroad Retirement Board Transcript of Board Orders	Transcript No. Special Page 1 of 1 Page Date Transcript Released

I certify that the following is a true and correct transcript of Board Order Numbered 42-119 transcribed from the Record of Proceedings of March 6, 1942.

JOHN DAVIDSON
Secretary of the Board

B.O. 42-119

ORDER

Amending Board Order 42-63 as amended by postponing the date for the receipt of Oral Argument on the issue of the "employer" status of Duquesne Warehouse Company and allowing further submissions.

1. Upon the request of Mr. George R. Allen, Counsel for Duquesne Warehouse Company

(a) The hearing of oral argument before the Board on the issue of whether Duquesne is an "employer" under the Railroad Retirement Act, scheduled by Board Order 42-63 to be heard on March 10, 1942 at 10:00 a.m., is postponed until March 31, 1942 at 10:00 a.m.; and

(b) He is granted opportunity to make a submission in the nature of an exception to the existing draft of the proposed Board decision on the issue which shall be submitted to the secretary of the Board in quintuple.

2. Board Order 42-63 as amended by Board Order 42-93 is amended to provide that

(a) The secretary of the Board shall transmit to the Brotherhood of Railway and Steamship Clerks copy of the existing draft of the proposed Board decision and copy of the submission of counsel for Duquesne pursuant to paragraph 1(b) hereof; and

(b) The Brotherhood of Railway and Steamship Clerks, or counsel for or representative thereof, shall be allowed to present a reply to such submission.

242 March 7, 1942

Mr. George R. Allen
Asistant General Counsel
The Pennsylvania Railroad Company
Broad Street Station Building
Philadelphia, Pennsylvania

Dear Sir:

Upon your request, transmitted to the Board by Mr. Reed, the Board has extended, from March 10, 1942 until March 31, 1942, at 10:00 a. m., the time for the hearing of oral argument on the issue of the "employer" status of Duquesne Warehouse Company, and has granted you the opportunity to make a submission in the nature of an exception to the existing draft of the proposed Board decision on the issue. While the Board did not set a definite time within which the submission must be received, it understands that it be transmitted as soon as possible and, at any event, no later than March 30, 1942. The Board requests that five copies be submitted.

As the Brotherhood of Railway and Steamship Clerks has evidenced an interest in this matter, it is necessary that they be given opportunity, if they so desire, to submit a reply to your submission. Therefore, if they should request this opportunity and if the submission should not be received in time for the reply to be submitted prior to March 31, 1942, it will be necessary to postpone the hearing of oral argument for a further brief period. It would be appreciated if you would inform the Board as soon as possible the date on which your submission may be expected.

Very truly yours,

JOHN C. DAVIDSON
Secretary of the Board

JCD:f

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March 7, 1942

Mr. Horace A. Bacus, Research Director
Brotherhood of Railway and Steamship Clerks
Room 701, Brotherhood of Railway Clerks Building
Cincinnati, Ohio

In the matter of Duquesne
Warehouse Company
Jurisdictional Docket No. 18

Dear Sir:

Following my telegram of yesterday.

Upon request of Mr. George R. Allen, Counsel for Duquesne Warehouse Company, the hearing of oral argument before the Board on the issue of whether Duquesne is an "employer" under the Railroad Retirement Act has been postponed from March 10, 1942 until March 31, 1942, and Mr. Allen has been granted the opportunity to make a submission in the nature of an exception to the existing draft of a proposed Board decision on the issue.

The Board has directed me to transmit to the Brotherhood copy of the existing draft of the proposed Board decision, which is enclosed, and also, when received, a copy of the submission of Counsel for Duquesne in the nature of an exception thereto. The Board has, of course, directed that the Brotherhood be allowed to present a reply to such submission if it is so desired.

Mr. Allen has been requested to make the submission as soon as possible but, if it is not received in time for the Brotherhood to make a reply before March 31, 1942, and the Brotherhood desires to make a reply, there will be a further postponement of the hearing of oral argument for that purpose. If, prior to the transmittal to you of copy of Mr. Allen's submission, it is possible for you to state whether the Brotherhood will wish to make a reply thereto, it would be appreciated if you would inform the Board accordingly.

Very truly yours,

JOHN C. DAVIDSON
Secretary of the Board

Enclosure
JCD:f

244 DUQUESNE WAREHOUSE COMPANY

Office of the President
Pennsylvania Station,
Pittsburgh, Pa.

March 25, 1942

Re: Duquesne Warehouse Company
Jurisdictional Docket No. 18

Mr. John C. Davidson, Secretary
Railroad Retirement Board
Washington, D. C.

Dear Sir:

In response to your favor of the 7th inst. in this proceeding, and more particularly the concluding paragraph of the same, let me say that on account of the shortness of stenographic services due to war depletion of forces it has not been possible to get our exceptions and brief filed up to this time. I now expect to have them filed on Friday of this week, the 27th inst. It is appreciated that because of this time of filing, the oral argument which is now set for the 31st inst. may be postponed. That will be altogether satisfactory to me. In such event, will you kindly let me know the date of any such postponement.

Very truly yours,

GEORGE R. ALLEN
George R. Allen,
Counsel

gra-h

Broad Street Station Building
Philadelphia, Penna.

245 DUQUESNE WAREHOUSE COMPANY

Office of the President
Pennsylvania Station,
Pittsburgh, Pa.,

March 27, 1942

Re: Duquesne Warehouse Company
Jurisdictional Docket No. 18

Mr. John C. Davidson, Secretary
Railroad Retirement Board
Washington, D. C.

Dear Sir:

Following my letter of the 25th inst., you will find enclosed five copies of exceptions of respondent, Duquesne Warehouse Company, to the proposed decision of the Board. Also you will find enclosed five copies of brief in support of those exceptions and the position in general taken by respondent in this proceeding. Will you kindly acknowledge receipt of the enclosures.

In accordance with my telephone conversation with you this morning, the case is to be submitted on the record as disclosed on page 2 of the enclosed exceptions. That, of course, is in lieu of a hearing. But by all means I wish the case to be argued and to have the opportunity of presenting the argument to the Board. Will you please let me know when a date has been set for the argument and what the date is. By argument I of course mean oral argument.

Very truly yours,

GEORGE R. ALLEN
George R. Allen,
Counsel

gra-h
enc.

Broad Street Station Building
Philadelphia, Penna.

246 RAILROAD RETIREMENT BOARD

In the Matter of Duquesne Warehouse Company } Jurisdictional Docket No. 18

EXCEPTIONS TO THE PROPOSED DECISION OF THE RAILROAD RETIREMENT BOARD

STATEMENT

Upon request of the Railroad Retirement Board Duquesne submitted on 17 February 1939 to the Board responses to its questionnaire on Form LQ-2 (revised). In substitution for those responses and on 15 September 1939, Duquesne filed with the Board its responses to the Board's subsequently reframed questionnaire on Form LQ-2-C adopted by the Board in April, '39. At the same time it filed with the Board the letter of its counsel of the same date and submitted a memorandum of facts and law in support of its position.

At that time there was no hearing before the Board members Eddy and Reed as stated in the Introductory of the proposed decision. Nor has there been any hearing in the case before the Board or anyone delegated by it for such purpose. The occasion referred to in the Introductory was an informal conference, at which were present on 15 September 1939, Board members Eddy and Reed, together with the General Counsel of the Board and counsel for Duquesne. On 14 February 1940, Duquesne submitted to the Board a further statement of facts with a memorandum of law on behalf of Duquesne. On 12 March 1942, counsel for Duquesne submitted to the Board two affidavits, one by H. A. Bietenduefel, Superintendent of Duquesne, and the other by Wilson V. Little, Executive Secretary of the American Warehousemen's Association, Merchandise
247 Division.[1] The aforesaid documents constitute the record in the case, and the case is submitted on that record.

[1] These affidavits were not before the Board at the time of the issuance of the proposed decision, and if because of that any change is desired to be made by the Board in the proposed decision, Duquesne will make any change in these exceptions to meet that situation when and if given the opportunity.

The Foregoing statement is submitted in exception to the Introductory in the proposed decision. Exception is taken more specifically to that part of the Introductory which presents the question at issue as

> "Whether Duquesne, as a company directly and completely owned and controlled by the Pennsylvania Railroad Company,";

While ownership is admitted, control is not more than stock control, and as will be more fully developed hereafter, the record is devoid of any proof that operation of Duquesne is in any way controlled by Pennsylvania. On the contrary, the opposite appears from the facts in the case.

Proposed Findings of Fact

First Finding. Exception is taken to so much of this finding as states that Duquesne was *caused* by Pennsylvania to be incorporated. No where in the record is there support for such a finding.

Exception is further taken to so much of the proposed finding as states that since its incorporation Duquesne has been directly and indirectly completely owned and controlled by Pennsylvania. Ownership of the stock is admitted. But control does not follow. The record shows that Duquesne is engaged in a commercial warehouse business, and that that business is conducted "under the direction of the Superintendent of the Warehouse Company, who has full and unrestricted authority to conduct a commercial warehouse business in accordance with the charter of the company." (Statement of Facts submitted 14 February 1940, p. 6.)

Third Finding. Exception is taken to so much of the third finding as states that "Duquesne's operations are now and have been at least since August 28, 1935 intimately and integrally related to those of Pennsylvania"; and further, to so much of the finding as states that in the storage, loading and unloading, and other handling of goods transported over the lines of Pennsylvania, Duquesne is
248 "in substance an agency of Pennsylvania for such purposes". The record shows that Duquesne is a separate corporation conducting a commercial warehouse business pursuant to its charter; that the receipt, delivery and handling of goods by it are altogether separate from the

services of Pennsylvania; that it is managed and operated by a Superintendent with full authority in the premises. Its dealings are with its patrons who engage its services, and with them are direct. It receives its instructions form them and collects its money from them. Nor is the operation of Duquesne essential to the operation of Pennsylvania. (Statement of Facts of 14 February 1940 pp. 3-6.)

Fourth Finding. Exception is taken to so much of this finding as may be intended to convey the meaning of any special advantage to Pennsylvania. Any industry which is located on the line of a railroad is an advantage to it in that presumably such industry is a shipper or receiver of freight over that line of railroad. Nothing further than that appears in this record as to Duquesne.

Seventh Finding. Exception is taken to this finding in that it fails to state that Duquesne's services at Erie were rendered in precisely the same way as those services are now rendered at East Liberty, and under the same conditions except that the commodity at Erie was newsprint paper and its patron the Pittsburgh Press. Further, exception is taken to this finding in that it fails to state that Duquesne has surrendered its lease of premises at Erie as of 1 May 1941, and now performs no services at Erie and is not in a position to perform any services there.[1]

Eighth Finding. Exception is taken to this language:

> "Duquesne's position as an agency of Pennsylvania, available to provide such facilities and services as the latter requires, appears further from Duquesne's
> 249 handling, reconditioning, and selling for Pennsylvania over freight, damaged refused freight, and damaged unclaimed freight under a contract entered into between the two companies on February 1, 1922."

The right of Pennsylvania to so dispose of such freight is not and cannot be questioned as a legitimate practice. The form of bill of lading under which the freight moves gives Pennsylvania that right—*Re Bills of Lading*, 64 I.C.C. 357, Appendix D, Sec. 4(a). When the freight has been delivered to Duquesne by Pennsylvania the railroad company has entirely severed its connection with the transportation of the property. (Statement of Facts of 15 September 1939, p. 1.) Further, it is not shown that Duquesne has

[1] This last sentence is subject to the footnote under the opening Statement in these exceptions.

ever delivered any of this freight for Pennsylvania, or at the direction of Pennsylvania ever disposed of any which has become worthless. Finally, the finding fails to show, as appears from the affidavit of Mr. Bietenduefel submitted 12 March 1942, that the contract referred to in the finding has been superseded by one dated 2 January 1941.[1]

Ninth Finding. Exception is taken to so much of this finding as reads as follows:

"Duquesne's revenues for the years 1936 through 1938 are indicative of the substantial extent to which it has been engaged in functions and activities connected with Pennsylvania's railroad transportation:"

The record discloses that Duquesne's functions and activities are not in any way connected with railroad transportation but are in commercial storage, a service which Pennsylvania does not perform and is not obligated to perform. The record shows that when the freight has been delivered by Pennsylvania to Duquesne "The Railroad has then completed its transportation". And with respect to outbound freight, it is also true that railroad transportation does not begin until the freight has been delivered into the possession of the Railroad. (Statement of Facts of 14 February, 1940, pp. 3, 5.)

250 *Eleventh Finding.* Exception is taken to this finding in that it fails to find as follows:

Employees of the warehouse company are on the payroll of that company only, and are paid solely out of its funds. They are hired by the warehouse company and discharged by it. They are under no continuing or other authority from the railroad company to supervise and direct the manner of rendition of their services, and never have been. They come under the direction of the Superintendent of the warehouse company, who has full and unrestricted authority to conduct a commercial warehouse business in accordance with the charter of the company. These employees are not accorded free transportation by the railroad; they are not entitled to become members of The Pennsylvania Railroad Voluntary Relief Department, or of The Pennsylvania Railroad Employes Provident and Loan Association: Membership in the Relief De-

[1] This last sentence is subject to the footnote under the opening Statement in these exceptions.

partment is limited to employees or former employees of the railroad company; that in the Provident and Loan Association to employees. They have never been regarded by the railroad company as its employees, nor by the warehouse company as other than employees of that company. (Statement of Facts, 14 February 1940, p. 6.)

Twelfth Finding. Exception is taken to this finding in that it is erroneous, both in whole and as to every detail. It gets no support from the facts in the record. On the contrary, the entire record shows that the operations of Duquesne are in commercial warehouse services—services not performed by Pennsylvania. Duquesne's operations are entirely separate and distinct from those of Pennsylvania. And since this finding is in the nature of a conclusion, it is not possible to cite any particular portion of the several statements of fact in the record. Those statements, both in detail and as a whole, refute the finding.

Thirteenth Finding. Exception is taken to this finding in that it states a conclusion which finds no support from the facts appearing in the record. On the contrary, the entire record shows that the services of Duquesne are performed as to inbound freight after railroad transportation is ended, and as to outbound freight before that has begun. And since this finding is in the nature of a con-
251 clusion, it is not possible to cite particular portions of the several statements of fact. They as a whole refute the finding.

Exceptions to Conclusions of Law

Respondent excepts to the conclusions of law appearing in the proposed decision in that the conclusions there stated are incorrect as matters of law, and further find no support whatever in the facts appearing in the record.

In the place of the findings of fact and conclusions of law submitted in the proposed decision of the Board, the Board should make the following findings of fact and conclusions of law:

Findings of Fact

1. Duquesne is a corporation of the Commonwealth of Pennsylvania. Its business as stated in its charter is "for the purpose of conducting a storage and warehouse business." It does a commercial warehouse business in Pittsburgh, Pa. at two locations—one in Pittsburgh proper and the other at East Liberty in Pittsburgh.[1] It issues warehouse receipts pursuant to the Warehouse Receipts Act of Pennsylvania—Act of 11 March 1909, P.L. 19. Its stock is owned by the Railroad. The record discloses no support for the majority finding that "Duquesne was *caused* by Pennsylvania to be incorporated on August 1, 1906, under the laws of the State of Pennsylvania." (Italics supplied.)

2. Duquesne's operations are confined to two commercial warehouses—one in Pittsburgh proper and the other at East Liberty in Pittsburgh. The two warehouses are owned by the Railroad and leased by it to Duquesne, except that a portion of the space on the ground floor of each warehouse is retained by the Railroad and used by it and officially designated in its tariffs as its freight stations for the general receipt and delivery of freight. The Railroad maintains an agency force at each station. These sta-
252 tions are fully equipped with tracks and other facilities for the receipt, delivery and handling of inbound and outbound freight, both carlot and less; and such service is rendered to the public generally. The operations of each are altogether separate from the operations of Duquesne.

3. Each warehouse has a railroad private siding where delivery is made by the Railroad in carlots to Duquesne. Placement on the siding by the Railroad is complete delivery to Duquesne. Transportation by railroad has then been completed. The owner unloads the cars. On outbound carlot shipments the Railroad places the empty cars on the siding and the owner loads. The Railroad does not come into possession of the property until loading has been completed, shipping instructions have been furnished to the Railroad, and the Railroad has issued its bill of lading in acceptance of the freight. On inbound delivery and outbound shipment of less than carload freight such delivery and acceptance are made and given by the agency of the

[1] It conducts no services in any way relating to passengers.

Railroad at the warehouses. Inbound the owner takes the freight from the Railroad station platform and receipts to the Railroad accordingly. Outbound the owner delivers the freight to the Railroad at the railroad station platform, and the Railroad accepts and issues its bill of lading covering. Transportation by railroad inbound in carlots ends on siding delivery; and on outbound begins upon completion of loading by shipper, furnishing to the Railroad of shipping instructions, and the issuance by the Railroad of its bill of lading. On less than carlot shipments transportation by railroad ends on delivery to the owner at the platform of the station agency, and begins on receipt from the owner at the same point.

4. All carlot shipments delivered to Duquesne by the Railroad and shipped out from Duquesne's warehouses over the railroad are carried by the Railroad at carload rates. As is customary generally with carload freight, and as required by the governing tariff of the Railroad, 253 the owner unloads on inbound and loads on outbound.

The requiring rule is No. 27, Section 1, of the governing tariff, which is Consolidated Freight Classification presently numbered 13; and reading as follows, (there being no exceptions as covered in the rule):

"Loading or Unloading.

"Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at CL ratings or rates, except where tariff of carrier at point of origin or destination or stopover station (as the case may be) provides for loading or unloading of CL freight by carrier."

5. After delivery of the freight by the Railroad to Duquesne, both carlot and less, the possession is that of Duquesne and the property is under the exclusive control and direction of Duquesne. A like situation prevails on outbound goods until delivery by Duquesne to the Railroad. During the control and possession by Duquesne, liability, if any, for loss, damage or injury to the property is that of Duquesne. Responsibility of the Railroad as to carlot freight inbound ceases upon delivery on the siding to Duquesne, and on outbound does not arise until receipt from Duquesne of the property loaded into the car and the issu-

ance of the bill of lading. The same applies on less than carload freight at the time of delivery by the Railroad to Duquesne on inbound shipments, and upon receipt from Duquesne of outbound shipments. All services accorded the property by Duquesne, such as loading, unloading, storing, ventilating, drying, moistening, packaging, assembling and distributing, are performed by Duquesne at the direction of the owner; under arrangements made direct by the owner with Duquesne; and charges for such services are made by Duquesne to the owner direct and paid by the owner direct to Duquesne.

6. At its warehouse in Pittsburgh proper, Duquesne conducts a general commercial warehousing business. That business comes to it both by rail and truck, and goes out likewise. About 40% moves out by truck. Speaking of 254 carlot shipments by rail inbound, they are consigned to the owners care of Duquesne. Unloading is performed by Duquesne for the owners. Outbound, carlot loading is performed by Duquesne for the owners. The owners are the shippers and so appear on the bills of lading. In the case of less than carlot shipments, Duquesne takes delivery for the owners at the platform of the railroad station agency, and on outbound shipments delivers for the owners to the Railroad at the same point.

7. At its East Liberty warehouse the only commodity handled by Duquesne is sugar in carlots. The sugar is packaged freight, originates at the eastern seaboard, and reaches Pittsburgh by rail transportation. It is consigned to the shipping sugar company care of Duquesne. Duquesne is used by the owner for storage, warehouse handling and subsequent distribution. Delivery inbound is made by the Railroad, and shipment outbound made by the owner as described in previous findings.

8. The tariff of the Railroad under which sugar and other carlot shipments of the commodities named in the tariff are transported by the Railroad carries a transit provision. That is, sugar and the commodities named in the tariff are transported by the Railroad to Pittsburgh and there delivered to the consignee at the carload rates local to Pittsburgh. If and when subsequently shipped out over the same railroad, the sugar is entitled to the through rate from the initial point of shipment to ultimate destination. The governing tariff of the Railroad, however, contains this express provision:

"While the shipments are stored in transit under these rules their custody and possession as between carrier and the consignee or owner, shall be that of the consignee or owner."

9. The transit provision in the tariff of the Railroad is not particular to any one consignee. It is restricted to
255 commodities and locations, but is open to all receivers and shippers of named commodities at the named points. For instance, transit on sugar is accorded by the Railroad also at Chicago, Detroit, Fort Wayne and Indianapolis; on lumber at Cincinnati, Fort Wayne and Toledo; on dairy products at Cincinnati, Cleveland, Detroit and Indianapolis; on grain at Chicago, Cincinnati, Pittsburgh and St. Louis; on iron and steel at Ambridge, Pa., Chicago and Logansport, Indiana. In addition, at East Liberty the transit provision is applicable also on canned food stuffs.

10. This same sugar arrangement at Pittsburgh has long been availed of by another large sugar refining company located on the eastern seaboard. It makes carlot shipments of sugar to Pittsburgh, consigning the same to another warehouse company. That company has a warehouse located on the line of the Railroad at Pittsburgh, connected with which is a private siding. The sugar of that refinery is shipped from the eastern seaboard to the warehouse company over the line of the Railroad, delivered by the Railroad to the warehouse company on its private siding, handled by the warehouse company while in its possession, and later distributed by the warehouse for the owner at Pittsburgh and throughout surrounding territory. Previous to 1942 much of this sugar was received by that warehouse company from the Railroad, handled by the warehouse company and then shipped out by the warehouse company over the railroad under the transit arrangement in precisely the same way as the sugar of another refinery is handled by Duquesne at its East Liberty warehouse. This arrangement terminated with the year 1941 because of contractual arrangements between the warehouse company and the refining company.

11. During a limited period, Duquesne operated a warehouse at Erie, Pa., where newsprint paper in carlots was stored for the Pittsburgh Press. The facilities were in use August 1937 to 15 May 1938. That was occasioned by an emergency with respect to price conditions on news-

256 print paper. The paper was delivered inbound by the Railroad to Duquesne on private siding of Duquesne, and on outbound movement was received by the Railroad from Duquesne and transported to Pittsburgh where delivery was made to the newspaper. The services of loading, unloading and handling by Duquesne were similar to those with respect to sugar at East Liberty. As of May 1, 1941, the lease of those facilities was terminated and Duquesne now performs no service whatever at Erie, Pa., and is not in a position to do so.

12. Duquesne files no tariffs with the Interstate Commerce Commission or with any public utility commission of any state. Nor is it a party to any tariff, either state or federal, of any common carrier subject to the provisions of Part I of the Interstate Commerce Act.

13. Duquesne sublets parts of its warehouse building at Pittsburgh proper to tenants who conduct their business there. They are chiefly manufacturing concerns or representatives of manufacturers. Duquesne has nothing to do with any shipments delivered to them by the railroad or made by them over the railroad. The Railroad delivers freight to them and receives freight from them in the same manner as freight is delivered to Duquesne by the Railroad and received by the Railroad from Duquesne.

14. Gross revenues of Duquesne for the years 1936-38 were as follows:

Year	Storage and handling of freight under transit provision	Storage and handling of other freight	Sale of Salvaged freight	Subleasing of space to tenants
1936	$59,570.40	$63,011.60	$ 8,599.00	$32,732.00
1937	30,239.93	91,545.99	11,409.00	24,967.00
1938	29,836.01	73,702.99	8,881.86	16,035.17

Of the space in the two warehouses at East Liberty and Pittsburgh proper, the approximate percentage of space devoted to operations with respect to freight coming under the transit arrangement was 30% in 1936, 12.5% in
257 1937, 12.5% in 1938. Total space was used at Erie for the limited period during which that warehouse was in operation. Of the employees of Duquesne engaged in the services with respect to freight coming under the transit provision, the approximate number of employees was 28 in 1936, 14 in 1937, and 14 in 1938. The approximate num-

ber of other employees of Duquesne engaged in general commercial storage in 1936 were 30, in 1937—42, in 1938—42; engaged in the handling of damaged and refused merchandise, 3 in 1936, 1937 and 1938; engaged in the subleasing of space to tenants, 4 in the years 1936, 1937 and 1938.

15. At its warehouse in Pittsburgh proper Duquesne receives from the Railroad over freight and damaged freight which is unclaimed or refused. Upon delivery by the Railroad, Duquesne takes entire possession of the freight, reconditions it where necessary and possible, and sells it at private sale. In case the property proves to be worthless, Duquesne disposes of it as determined by its judgment. Duquesne has never made delivery of any freight for the Railroad. The present contract, effective 2 January 1941, contains no provision for such delivery. For its services Duquesne charges the Railroad 10% of the gross proceeds of sale, with deduction for any necessary expense in reconditioning and handling, and remits the balance to the Railroad. Should the gross proceeds realized at any sale not equal the expenses of Duquesne in handling the freight, plus the 10% commission, Duquesne is credited with the difference. All of the services of Duquesne with respect to this property are altogether after the freight has finished transportation in railroad service, and is a separate and independent transaction.

16. Employees of Duquesne are on the payroll of that company only, and are paid solely out of its funds. They are hired by Duquesne and may be discharged by it only. They come only under the supervision, direction and authority of a Superintendent, who has full and unrestricted authority to conduct a commercial warehouse business
258 in accordance with the charter of the company. These employees are not accorded free transportation by the Railroad and never have been. They are not entitled to become members of The Pennsylvania Railroad Voluntary Relief Department or The Pennsylvania Railroad Employes Provident and Loan Association, organizations in which membership is restricted as to the Relief Department to employees and former employees of the Railroad, and as to the Provident and Loan Association to employees of the Railroad. They have never been regarded by the Railroad as its employees or by Duquesne as other than its em-

ployees. Nor has any organization, board or other body considered them to be employees engaged in railroad transportation service, or sought to have them declared to be such.

17. Duquesne meets the requirements of the Fair Labor Standards Act of 1938. The hours of labor of its employees are regulated accordingly. It is subject to the Pennsylvania Workmen's Compensation Act of 1915, P.L. of 1915, 736, as amended, and pursuant to the terms of that Act provides the required insurance for the payment of compensation to its employees.

18. In the valuation of property of the Railroad by the Interstate Commerce Commission pursuant to Sec. 19a of Part I of the Interstate Commerce Act—22 Valuation Reports, entire volume—these warehouses are not classified as properties of the Railroad used for common carrier purposes.

19. Since 28 August 1935, Duquesne has not been engaged in the non-casual operation of equipment or facilities and the performance of non-casual service, other than trucking service, in connection with the transportation of property by railroad or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad.

259 CONCLUSIONS OF LAW

Duquesne does not now, nor has it at any time operated any equipment or facility, or performed any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad; and is not now, and has not at any time been an "employer" within the meaning of Section 1 (a) of the Retirement Acts of 1935 or 1937.

A general brief in support of these exceptions and of the position taken by respondent in the proceeding is herewith filed with these exceptions.

Respectfully submitted,
GEORGE R. ALLEN.
Counsel for Respondent
Broad Street Station Building
Philadelphia, Penna.

24 March 1942

260 Apr 2 1942

Mr. George R. Allen, Assistant General Counsel
The Pennsylvania Railroad Company
Legal Department
Philadelphia, Pennsylvania

In the matter of Duquesne Warehouse Company
Jurisdictional Docket No. 18

Dear Sir:

This will acknowledge receipt of your letter of March 12, 1942, submitting two affidavits relevant to this case, and your letter of March 27, 1942, filing five copies each of exceptions to the proposed decision of the Board and a brief in support of the exceptions and the position taken by the Duquesne Warehouse Company in this proceeding.

In accordance with your request, the affidavits enclosed in your letter of March 12, 1942, will be included in the record together with the facts theretofore submitted. As you were advised, the oral argument, which was set for March 31, 1942, was postponed. You will be notified as soon as a new date is fixed.

The Brotherhood of Railway and Steamship Clerks, which is an interested party in the proceeding, will be furnished with copies of the documents submitted by you and will be afforded an opportunity to file, within a reasonable time, any material by way of reply to the materials supplied by you or otherwise pertinent to its view of the case.

Very truly yours,
JOHN C. DAVIDSON
Secretary of the Board

JCD:RB:rr

261 Apr 2 1942

Mr. Horace A. Bacus, Research Director
Brotherhood of Railway and Steamship Clerks
Room 701, Brotherhood of Railway Clerks Building
Cincinnati, Ohio

In the matter of Duquesne Warehouse Company
Jurisdictional Docket No. 18

Dear Sir:

I enclose herewith copies of two affidavits, exceptions to the proposed decision of the Board, and a brief in sup-

port of those exceptions, submitted by Mr. George R. Allen, Assistant General Counsel of The Pennsylvania Railroad Company. I also enclose copies of the letters accompanying those documents. It is regretted that it has been impossible to secure for you copies of Exhibits B and C to the affidavit of Wilson V. Little, described on page 2 of such affidavit. If you desire to examine the copies in the record, I shall be glad to send them to you.

You will note that Mr. Allen is resting his case on the basis of the facts heretofore submitted but wishes to have an opportunity to present oral argument before the Board. As you were advised, the argument, which was set for March 31, 1942, was postponed. You will be notified as soon as a new date is fixed.

You may submit, as soon as possible, any material by way of reply to the material submitted by the Company or otherwise pertinent to an understanding of the case. It is requested that any documents by way of additional evidence be submitted in duplicate and that five copies be furnished of any brief or reply to the Company's exceptions.

Very truly yours,

JOHN C. DAVIDSON,
Secretary of the Board

Enclosures
JCD:RB:rr

262 DUQUESNE WAREHOUSE COMPANY

Office of the President
Pennsylvania Station,
Pittsburgh, Pa.,

April 6, 1942

In the matter of Duquesne Warehouse Company
Jurisdictional Docket No. 18
Mr. John C. Davidson, Secretary
Railroad Retirement Board
Washington, D. C.

Dear Sir:

Thank you for yours of the 2nd inst. relative to this matter. I take it that in the event the Brotherhood of Rail-

way and Steamship Clerks files any material I shall be supplied with a copy of the same.

Very truly yours,

GEORGE R. ALLEN
George R. Allen
Counsel
1740 Broad Street Station Building
Philadelphia, Penna.

gra-h

263 Grand Lodge

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS

Freight Handlers, Express and Station Employes

Brotherhood of Railway Clerks Bldg.
Cincinnati, Ohio

George M. Harrison
Grand President

Cincinnati, Ohio
May 6, 1942

Mr. Richard L. Cooper, Secretary,
Railroad Retirement Board,
Washington, D. C.

In the Matter of Duquesne Warehouse Company—
Jurisdictional Docket No. 18

Dear Sir:

The Brotherhood does not desire to submit any material in this case, it being our feeling that the evidence now before the Board clearly supports the proposed Board decision.

I shall appear for the Brotherhood on oral argument of the matter and shall appreciate your advising me when the date for argument has been set.

Very truly yours,

HORACE A. BACUS
Research Director

264 May 13, 1942

Mr. Horace A. Bacus, Research Director,
Brotherhood of Railway and Steamship Clerks
Room 701, Brotherhood of Railway Clerks Building
Cincinnati, Ohio

In the matter of Duquesne
Warehouse Company
Jurisdictional Docket No. 18

Dear Sir:

Notice is hereby given that the oral argument before the Board on the question of whether Duquesne Warehouse Company is an "employer" under the Railroad Retirement Acts, will be held at the office of the Board, 10th and U Streets, N. W., Washington, D. C., on May 27, 1942, at 10:00 a.m.

By order of the Board:

RICHARD L. COOPER
Secretary of the Board

RLC:f

265 May 13, 1942

Mr. George R. Allen
Assistant General Counsel
The Pennsylvania Railroad Company
Broad Street Station Building
Philadelphia, Pennsylvania

In the matter of Duquesne
Warehouse Company
Jurisdictional Docket No. 18

Dear Sir:

Notice is hereby given that the oral argument before the Board on the question of whether Duquesne Warehouse Company is an "employer" under the Railroad Retirement Acts, will be held at the office of the Board, 10th and U Streets, N. W., Washington, D. C., on May 27, 1942, at 10:00 a.m.

By order of the Board:

RICHARD L. COOPER
Secretary of the Board

RLC:f

266 Feb 1 1943

A&C:RR:1-GS

Duquesne Warehouse Company,
Pennsylvania Station,
Pittsburgh, Pennsylvania.

Attention: Mr. George R. Allen,
Counsel.

Sirs:

Reference is made to your letters dated April 22, June 3, and September 3, 1940, relative to the status of the Company under the Carrier Taxing Act of 1937 and Subchapter B of Chapter 9 of the Internal Revenue Code. The delay in replying to your letters has been occasioned by the extended consideration given to the matter and is regretted.

The information submitted discloses that the Duquesne Warehouse Company is a corporation chartered for the purpose of conducting a storage and warehouse business and that its stock is owned by The Pennsylvania Railroad Company. Its operations are confined to the warehouses, one located at East Liberty, Pennsylvania, and the other at Pittsburgh, Pennsylvania. Both warehouses are owned by the Railroad Company and leased to the Warehouse Company with the exception of a portion of the ground floor of each building which is retained by the Railroad Company and used by such Company as its freight agency. The only commodity handled at the warehouse located at East Liberty, Pennsylvania, is sugar in carload lots which comes in and goes out over the Pennsylvania Railroad. Approximately ninety-five per cent of the commodities handled at the warehouse located at Pittsburgh, Pennsylvania, which commodities are diverse in character and are hauled in both carload and less-than-carload lots, come in over the Pennsylvania Railroad, the remainder coming in by truck. The Pennsylvania Railroad carries about sixty per cent of the outgoing commodities with the remainder being hauled by truck.

Upon the basis of all the information submitted it is the opinion of this office that the Duquesne Warehouse Company is an "employer" within the meaning of the Carriers Taxing Act of 1937 and Subchapter B of Chapter 9 of the Internal Revenue Code since the warehousing services conducted by the company constitute
267 the performance of substantial services in connection with railroad transportation. Accordingly, it is held

that liability for the taxes imposed under the above provisions of law is incurred by the Company with respect to the compensation not in excess of $300.00 per month earned by each of the employees of the Company, including its officers.

Respectfully,
(Signed) GEO. J. SCHOENEMAN
Deputy Commissioner

GS:RMH

268 Feb 27, 1943

Registered Mail
Mr. George R. Allen
Assistant General Counsel
The Pennsylvania Railroad Company
Broad Street Station Building
Philadelphia, Pennsylvania

In the Matter of Duquesne Warehouse Company,
Jurisdictional Docket No. 18

Dear Sir:

Please be advised that the Board, on February 11, 1943, decided that the Duquesne Warehouse Company is an "employer" under the Railroad Retirement Act and that, therefore, service rendered to the company is creditable toward annuities under that Act. You will be furnished with a copy of the Board's decision as soon as it is released.

Very truly yours,
MARY B. LINKINS
Secretary of the Board

269 Feb 27 1943

Registered Mail
George M. Harrison, Grand President
Brotherhood of Railway and Steamship Clerks
Brotherhood of Railway Clerks Building
Cincinnati, Ohio

In the Matter of Duquesne Warehouse Company,
Jurisdictional Docket No. 18

Dear Sir:

Please be advised that the Board, on February 11, 1943, decided that the Duquesne Warehouse Company is an "employer" under the Railroad Retirement Act and that, therefore, service rendered to the company is creditable toward

annuities under that Act. You will be furnished with a copy of the Board's decision as soon as it is released.

Very truly yours,

MARY B. LINKINS
Secretary of the Board

270 Mar 5 1943

Registered Mail

George M. Harrison, Grand President
Brotherhood of Railway and Steamship Clerks
Brotherhood of Railway Clerks Building
Cincinnati, Ohio

In the Matter of Duquesne Warehouse Company,
Jurisdictional Docket No. 18

Dear Sir:

I enclose herewith a copy of the Board's decision in the above entitled proceeding.

Very truly yours,

MARY B. LINKINS
Secretary of the Board

Enclosure

271 Mar 5 1943

Registered Mail

Mr. George R. Allen
Assistant General Counsel
The Pennsylvania Railroad Company
Broad Street Station Building
Philadelphia, Pennsylvania

In the Matter of Duquesne Warehouse Company,
Jurisdictional Docket No. 18

Dear Sir:

I enclose herewith a copy of the Board's decision in the above entitled proceeding.

Very truly yours,

MARY B. LINKINS
Secretary of the Board

Enclosure

272 Mar 5 1943

Hon. Guy T. Helvering
Commissioner of Internal Revenue
Washington, D. C.

In the Matter of Duquesne Warehouse Company,
Jurisdictional Docket No. 18

Dear Sir:

I enclose herewith a copy of the Board's decision in the above-entitled proceeding.

Very truly yours,
MARY B. LINKINS
Secretary of the Board

Enclosure

273 Mar 5 1943

Mr. Oscar M. Powell
Executive Director
Social Security Board
Washington, D. C.

In the Matter of Duquesne Warehouse Company,
Jurisdictional Docket No. 18

Dear Sir:

I enclose herewith a copy of the Board's decision in the above-entitled proceeding.

Very truly yours,
MARY B. LINKINS
Secretary of the Board

Enclosure

274 Mar 5, 1943

Mr. Robert F. Cole
Secretary
National Mediation Board
Washington, D. C.

In the Matter of Duquesne Warehouse Company,
Jurisdictional Docket No. 18

Dear Sir:

I enclose herewith a copy of the Board's decision in the above-entitled proceeding.

Very truly yours,
MARY B. LINKINS
Secretary of the Board

Enclosure

663974 O - 45 - 18

275 Form G-101
(9-36)

FEDERAL SECURITY AGENCY
SOCIAL SECURITY BOARD
1712 G Street NW. 14:CP:C
Washington, D. C.

INTERDEPARTMENT TRANSFER SLIP

Date May 28, 1943

There is herewith transferred to:
Mr. Ludo C. Pickett,
Director, Retirement Claims,
Railroad Retirement Board,
844 Rush Street,
Chicago, Illinois

A 200-586 Certified

A copy of letter addressed to Mr. Elisha H. Craig, 1415 Milan Avenue, Brookline, Pittsburgh, Pennsylvania, account number 159-12-4276, disallowing his claim under Title II of the Social Security Act.

Concerning: It appears from information on file in this office that the wage earner may have been an "employee" as defined in section 1(b) Railroad Retirement Act, 1937.

Which apparently requires your attention.

Writer has been informed of this reference.

(Signature) JOHN J. CORSON,
Director
(Title) Bureau of Old-Age and Survivors Insurance

C.H NAN BF

276 COVERAGE POLICY SECTION

159-12-4276-A
Field Office: Pittsburgh, Pennsylvania
May 6, 1943

Area Office:
Philadelphia, Pennsylvania
Mr. Elisha H. Craig,
1415 Milan Avenue,
Brookline, Pittsburgh, Pennsylvania

Dear Mr. Craig:

This letter refers to your claim for benefits under Title II

of the Social Security Act. Our records show that you are not now entitled to primary insurance benefits.

The Social Security Act provides that a wage earner must be fully insured in order to qualify for benefits. To be fully insured you must have been paid wages of at least $50.00 in each of six calendar quarters since January 1, 1937. Our records show that you have not been paid wages of $50.00 or more in any calendar quarter. When you have the necessary quarters for an insured status, you may then file your application for benefits.

Pay received from *Duquesne Warehouse Company, Pittsburgh*, Pennsylvania, could not be included because employment with this company is not covered by the Social Security Act.

We have been informed by the Railroad Retirement Board 844 North Rush Street, Chicago, Illinois, that services for the Duquesne Warehouse Company are creditable toward annuities under the Railroad Retirement Act and that your claim is being adjudicated under that act. A copy of this letter is being sent to that Board.

If you disagree with this determination, you may request the Bureau of Old-Age and Survivors Insurance to reconsider your claim. Additional evidence is not essential to obtain a reconsideration, but if new evidence is available, it should be submitted. If you prefer, you may request a hearing on your claim before a referee of the Social Security Board. A request for a reconsideration or a hearing should be made promptly, and must be filed within six months of this date.

277 If you have any questions as to your claim or if you wish to request a reconsideration or a hearing, call at or write to the field office at the address given above.

Very truly yours,

JAMES F. TULLY,
Chief, Area Office

cc—Railroad Retirement Board
jsk:yr
207

Note: Application received by the Social Security Board at Pittsburgh, Pennsylvania, on March 2, 1942.

[Affidavit of service omitted in printing]

IN UNITED STATES DISTRICT COURT

MOTION OF BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES AND GEORGE M. HARRISON, PRESIDENT OF SAID BROTHERHOOD, FOR LEAVE TO INTERVENE AS PARTIES DEFENDANT—Filed September 24, 1943

Now come the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees, an international labor organization (hereinafter referred to as the "Brotherhood"), and George M. Harrison, President of the said Brotherhood, acting in their own behalf, and in behalf of certain employees of the plaintiff who are members of the said Brotherhood, or are represented by it, and move the Court for leave to intervene herein as parties defendant, to file their answer (a copy of which is tendered to the Court herewith), and to participate fully in all further proceedings herein as parties defendant, and in support of their said motion, represent to the Court as follows, to-wit:

1.

The Brotherhood is an unincorporated association or labor union which numbers among its members substantially all of the employees of the plaintiff. The said Brotherhood is the duly selected and recognized collective bargaining representative of the said employees, and has heretofore negotiated with the plaintiff a collective bargaining agreement governing the working conditions of the said employees.

2.

George M. Harrison is the International President of the said Brotherhood, and appears herein in a representative capacity as such President, and as representative of the employees, members of the said Brotherhood generally, and more particularly as the representative of the employees of the plaintiff.

3.

According to a decision of the defendant Railroad Retirement Board, which was rendered on February 11, 1943, and which is referred to in the complaint, the employees of the plaintiff as entitled to accumulate service toward, and eventually receive certain annuities under a statute of the United States known as the Railroad Retirement Act. As stated in the complaint, it is the purpose of this action to set aside said decision of the said Board. If plaintiff prevails, therefore, the employees of the plaintiff will lose valuable rights under the said Railroad Retirement Act.

4.

The Brotherhood participated actively in said proceedings conducted by the Railroad Retirement Board prior to the issuance of its decision aforesaid, and it and the employees represented by it, and in whose behalf it acts, are the real parties in interest in this case.

5.

The interests of the said employees are fully represented herein by the Brotherhood and by George M. Harrison, President of the Brotherhood.

6.

The sole defendant named in the complaint is the Railroad Retirement Board, which is a government agency having no financial interest in the outcome of this case, and the representative of the interests of the said employees by the said Board may therefore be inadequate for the full protection of such interests.

7.

The answer proposed to be filed by the intervenors herein, which is tendered herewith, presents issues of law and fact which are common to and identical with the issues presented by the complaint of the plaintiff and the answer of the Railroad Retirement Board.

Wherefore, in behalf of themselves, and in behalf of the employees of the plaintiff, all of whose interests these parties fully represent, the moving parties respectfully move

that this Court grant them leave to intervene in this proceeding, to file an answer herein, and to take such part in the further proceedings of this cause as may be necessary and appropriate to protect their interests and the interests of those whom they represent.

FRANK L. MULHOLLAND
Frank L. Mulholland
1041 Nicholas Building
Toledo, Ohio

CLARENCE M. MULHOLLAND
Clarence M. Mulholland
1041 Nicholas Building
Toledo, Ohio

WILLARD H. McEWEN
Willard H. McEwen
1041 Nicholas Building
Toledo, Ohio

Attorneys for Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees, and George M. Harrison, President of said Brotherhood.

Duly sworn to by Geo. M. Harrison; jurat omitted in printing.

The undersigned hereby acknowledge receipt of a copy of the above motion, waive service or other and further notice of the filing of the same, and hereby consent that the said motion be granted.

GEO. M. HARRISON
BURLINGHAM, VEEDER, CLARK & HUPPER,
Attorneys for Plaintiff.

JOSEPH H. FREEHILL
Attorney for Defendant, Railroad Retirement Board.

Sworn to before me and subscribed in my presence this *1st* day of *Sept.* 1943.

MAURICE GOLDMAN
Maurice Goldman, Notary Public

My Commission expires Mar 29, 1946

IN UNITED STATES DISTRICT COURT

ANSWER OF BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AND GEORGE M. HARRISON, PRESIDENT OF SAID BROTHERHOOD, INTERVENING DEFENDANTS

Filed September 24, 1943

Now come the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and George M. Harrison, intervening defendants in the above entitled action, and for their answer to the complaint of the plaintiff say:

First. They deny that this action is one arising under 28 U.S.C. Section 41 (8), but admit all other allegations of the first section of the complaint.

Second. The allegations of the second section of the complaint are admitted, except insofar as they may be construed as alleging that the plaintiff is engaged in no service or is operating no facility in connection with the transportation of property by railroad within the meaning of the Railroad Retirement Act, and to the extent that the said allegations may be so construed, they are denied.

Third. The allegations of the third section of the complaint are admitted with the exception of the last sentence thereof, which is denied.

Fourth. These defendants are without knowledge as to the truth or falsity of the allegations contained in Section Fourth of the complaint, and hence deny the same for want of such knowledge.

Fifth. These defendants are without knowledge as to the truth or falsity of the allegations contained in Section Fifth

of the complaint, and hence deny the same for want of such knowledge.

Sixth. The allegations of the Sixth Section of the complaint are admitted.

Seventh. In answer to Section Seventh of the complaint, these defendants admit that the various exhibits attached to the complaint are true and correct copies of the documents and instruments of which they purport to be copies, and that the originals of the said exhibits form portions of the record of the defendant Railroad Retirement Board in this case.

Further answering Section Seventh, and in particular, the numbered subsections (1) to (6), inclusive, these defendants are advised and so represent to the Court that the statements contained therein constitute the conclusions of the plaintiff as to the legal effect of certain documentary evidence presented to the Railroad Retirement Board, that they are not allegations of fact, and that accordingly they require no answer from these defendants.

Insofar, however, as the statements contained in said subsections (1) to (6) under Section Seventh of the complaint may be held to constitute allegations of fact, these defendants are without knowledge as to the truth or falsity of the allegations of said subsections, and hence deny the same for want of such knowledge, except insofar as the said allegations are in accord with the findings of fact made by the Railroad Retirement Board in the opinion referred to in the complaint. To the extent that the said allegations are so in accord with the said findings, they are admitted.

Eighth. These defendants are without knowledge as to the truth or falsity of the allegations contained in Section Eighth of the complaint, and hence deny the same for want of such knowledge.

Ninth. These defendants deny each and every allegation contained in Section Ninth of the complaint.

Tenth. These defendants deny each and every allegation contained in Section Tenth of the complaint.

WHEREFORE, having fully answered the allegations of the complaint, these defendants pray that the same be denied and dismissed at the plaintiff's costs.

FRANK L. MULHOLLAND
CLARENCE M. MULHOLLAND
WILLARD H. MCEWEN

Duly sworn to by Geo. M. Harrison; jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING MOTION OF BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AND GEORGE M. HARRISON, PRESIDENT OF SAID BROTHERHOOD, FOR LEAVE TO INTERVENE AS PARTIES DEFENDANT, TO FILE THEIR ANSWERS, AND TO PARTICIPATE IN ALL PROCEEDINGS HEREIN—Filed September 24, 1943

Upon the annexed notice of motion of Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees, and George M. Harrison, as President of the said Brotherhood, for leave to intervene as parties defendant in this action, and upon the annexed written consent executed by the attorneys for the plaintiff and for the defendant herein, and upon application of Frank L. Mulholland, Esq., Clarence M. Mulholland, Esq., and Willard H. McEwen, Esq., attorneys for Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express &

Station Employees, and George M. Harrison, President of said Brotherhood, Samuel J. Cohen, Esq., of Counsel, it is hereby

Ordered, that the aforesaid motion of Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees, and George M. Harrison, as President of said Brotherhood, for leave to intervene as parties defendant in this action, and to participate fully in all proceedings herein as parties defendant, and to file their answer herein, be and the same hereby is granted.

Dated, New York, N. Y., September 24, 1943.

HULBERT
United States District Judge

IN UNITED STATES DISTRICT COURT

[Title omitted.]

PLAINTIFF'S NOTICE OF MOTION FOR SUMMARY JUDGMENT

Filed October 15, 1943

Sirs:

Please take notice that upon the complaint and answers and all proceedings heretofore had herein, and pursuant to Rule 56 of the Federal Rules of Civil Procedure, plaintiff will move this Court at a term appointed for the hearing of motions in Room 506 of the United States Courthouse, Foley Square, Borough of Manhattan, City of New York, on October 19, 1943, at 10:30 a.m., or as soon thereafter as counsel can be heard, for summary judgment in plaintiff's favor for the relief demanded in the complaint on the

ground that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law, and for such other and further relief as may be just in the premises.

Dated: New York, N. Y., October 6, 1943.

Yours, etc.,

BURLINGHAM, VEEDER, CLARK & HUPPER
Burlingham, Veeder, Clark & Hupper,
Attorneys for Plaintiff,
Office and Post Office Address:
27 William Street,
Borough of Manhattan,
City of New York.

To:

The Honorable Francis Biddle,
Attorney General of the United States,
Washington, D. C.

James B. M. McNally, Esq.,
United States Attorney,
United States Courthouse,
Foley Square,
New York, N. Y.

Joseph H. Freehill, Esq.,
Attorney for defendant,
844 Rush Street,
Chicago, Illinois.

Samuel J. Cohen, Esq.,
Attorney for intervening defendants,
50 E. 42nd Street,
New York, N. Y.

NOTICE OF MOTION OF DEFENDANT RAILROAD RETIREMENT BOARD FOR SUMMARY JUDGMENT

Filed October 18, 1943

Sirs:

Please take notice that on the 29th day of October, 1943, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, at a term appointed for the hearing of motions in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York, the defendant Railroad Retirement Board will move this Court for summary judgment in the defendant's favor dismissing the action, in accordance with Rule 56 of the Rules of Civil Procedure for the District Courts of the United States, on the ground that the complaint and the answer of the defendant Railroad Retirement Board (which includes, as part thereof, a certified copy of the Record before the Railroad Retirement Board in Jurisdictional Docket No. 18, In the Matter of Duquesne Warehouse Company) show that there is no genuine issue as to any material fact and that the defendant Railroad Retirement Board is entitled to judgment as a matter of law.

(Signed) JOSEPH H. FREEHILL
Joseph H. Freehill
General Counsel
Railroad Retirement Board
844 Rush Street
Chicago, Illinois
Attorney for Defendant
Railroad Retirement Board

Chicago, Illinois
October 16, 1943

To:

Burlingham, Veeder, Clark and Hupper,
Attorneys for Plaintiff
27 William Street
New York, New York

Samuel J. Cohen, Esq.
Attorney for Intervening Defendants
50 East 42nd Street
New York, New York

[Affidavit of service omitted in printing]

NOTICE OF MOTION OF INTERVENING DEFENDANTS FOR SUMMARY JUDGMENT

Served October 19, 1943; filing date, July 6, 1944

Sirs:

Please take notice, that upon the pleadings and upon all proceedings heretofore had herein, the defendants, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express & Station Employees, and George M. Harrison, President of said Brotherhood, will move this Court, at a Term appointed for the hearing of motion at the United States Courthouse, Foley Square, in the Borough of Manhattan, City of New York, on the 29th day of October, 1943, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for summary judgment in the defendants' favor dismissing the action in accordance with Rule 56 of the Rules of Civil Procedure for the District Courts of the United States, on the ground that the pleadings herein show that there is no genuine issue as to any material fact, and that the defendants are entitled to judgment as a matter of law.

Dated, New York, October 18, 1943.

Yours, etc.

FRANK L. MULHOLLAND
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1041 Nicholas Building
Toledo, Ohio

CLARENCE M. MULHOLLAND
Clarence M. Mulholland
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Toledo, Ohio

WILLARD H. McEWEN
Willard H. McEwen
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Toledo, Ohio

Attorneys for Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees, and George M. Harrison, President of said Brotherhood.

SAMUEL J. COHEN
Samuel J. Cohen
50 East 42nd Street
New York, New York

Counsel for defendants above named

To:

Burlingham, Veeder, Clark & Hupper, Esqs.
Attorneys for Plaintiff
27 William Street
New York, New York

Joseph H. Freehill, Esq.
Attorney for Railroad Retirement Board
844 Rush Street
Chicago, Illinois

IN UNITED STATES DISTRICT COURT

BURLINGHAM, VEEDER, CLARK & HUPPER,
Attorneys for Plaintiff,
By George R. Allen
Ray Rood Allen
Herbert Mayhew Lord, of Counsel

JOSEPH H. FREEHILL,
Attorney for Defendant

SAMUEL J. COHEN
FRANK L. MULHOLLAND
CLARENCE M. MULHOLLAND
WILLARD H. MCEWEN
Attorneys for Brotherhood of
Railway & Steamship Clerks, Freight
Handlers, Express and Station Employees.

DECISION AND OPINION

Filed February 29, 1944

GODDARD, District Judge:

The plaintiff and defendant have moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The suit is brought by the plaintiff pursuant to Section 11 of the Railroad Retirement Act, for a review of the Administrative Board's determination that the Duquesne Warehouse Company [hereinafter referred

to as Duquesne] is an "employer" within Section 1(a)* of the Railroad Retirement Act of 1935 and 1937 [hereinafter referred to as the Retirement Act, 45 U.S.C.A. § 228(a)], therefore subject to the provisions of the Act and consequently service rendered to Duquesne from the time of its incorporation on August 1, 1906 to date is creditable toward annuities under the Act. By consent the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and George A. Harrison, President of said Brotherhood, have become intervening defendants.

The plaintiff, Duquesne Warehouse Company, was incorporated under the laws of the Commonwealth of Pennsylvania on August 1, 1906, and chartered for the purposes of conducting a storage and warehouse business. Since that time it has conducted a commercial warehouse business at Pittsburgh, Pennsylvania, in two places—one at East Liberty, and the other in Pittsburgh proper. From August, 1937 to May, 1938 it conducted a warehouse business at Erie, Pennsylvania but solely with respect to news-paper print.

Duquesne's entire stock is owned by Pennsylvania Railroad Company and the officers of Duquesne are also officers of Pennsylvania.

Both warehouses are owned by Pennsylvania Railroad Company and operated by the plaintiff under a lease from Pennsylvania. There are direct railroad siding connections at both East Liberty and Pittsburgh proper; and in the buildings, both at East Liberty and Pittsburgh proper, the Railroad Company maintains its own freight agencies with its separate freight agents for the receipt and delivery of carload freight and less than carload lots. Duquesne issues warehouse receipts and is subject to the Pennsylvania Warehouse Receipts Acts. At the East Liberty warehouse the only commodity handled is sugar; this is an account of

* "Section 1. For the purposes of this Act—

(a) The term 'employer' means any carrier [as defined in sub-section (m) of this section], and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service [except trucking service, casual service, and the casual operation of equipment or facilities] in connection with the transportation of passenger or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling or property transported by railroad. * * *"

the California and Hawaiian Sugar Refining Corporation. The sugar is partly refined in California and partly in New York. That refined in California comes east by ship to one of the eastern ports and then moves by rail to Pittsburgh, which is used as a distributing point. That refined at New York moves by rail to Pittsburgh and from there is subsequently distributed. All sugar, either coming in or going out, is in carload lots.

At the other building in Pittsburgh proper a substantial warehouse business is conducted. The business comes into the warehouse chiefly by rail, approximately ninety five percent. The other is trucked in but not locally. Coming by rail it arrives either in carload lots or less.

In the handling of the sugar and other freight received by the Warehouse for storage, it renders such services as the owner requests; it assorts and repacks the sugar in bags and cartons for distribution to the owners' customers. On outbound shipments the Warehouse receives from the Railroad bills of lading and on inbound shipments it issues warehouse receipts to the owners of the goods, and renders various services at their request for which the owner pays the Warehouse.

The employees of the Warehouse Company and the employees of the Railroad Company are entirely segregated. Employees of the Warehouse Company are on the payroll of that company and are paid by that company; they have never been employees of the Railroad Company; they are not accorded the pass privilege; they are not entitled to become members of the Pennsylvania Voluntary Relief Department, nor may they be members of the Pennsylvania Railroad Provident and Loan Association. Membership in the Voluntary Relief Department is limited to employees or former employees of the railroad; that in the Provident and Loan Association—to employees of the Railroad. The employees of the Warehouse Company are members of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and with which Brotherhood the Warehouse Company has a working agreement. The goods, when in the warehouse, are under the sole supervision and control of Duquesne, or the owners of the goods.

Under a separate contract the Railroad delivers to the Warehouse Company freight which is damaged or refused.

In making such delivery to the Warehouse Company the Railroad Company entirely severs its connection with the transportation of the property. The Warehouse Company reconditions such damaged or refused freight and sells it at private sale. For its services it charges ten percent of the gross proceeds of the sale, with deductions for any necessary expense, such as reconditioning, and remits the balance to the Railroad Company.

Duquesne sublets a portion of its space to the public for its own account. The greater portion of Duquesne's income is derived from sources other than the railroad contracts. Duquesne did, and does now, maintain a working agreement with Pennsylvania covering storage in transit privileges. Duquesne was recognized as a member of the Warehouse Industry under the N.R.A. Code. It was also recognized and paid accordingly as a member of the General Social Security Plan and not as a member of the Special Railroad Security System. Duquesne also paid according to State Unemployment Compensation Law. The properties of the Warehouse Company were never classified as carrier properties in the valuation of properties of the Pennsylvania Railroad Company by the Interstate Commerce Commission.

The Railroad Retirement Board [hereinafter referred to as the Board] consists of three members. The determination was made by the majority of the Board, but the third member, Mr. Reed, reached a contrary conclusion and dissented. The majority and the dissenting member made findings of fact and conclusions of law.

The first question to be decided is the scope of the review by this court. Are the findings, as made by the Board, conclusive upon the court if they are based on substantial evidence, and are not arbitrary or capricious?

In all matters delegated to the Board for determination and administration its judgments are final if supported by substantial evidence and free from arbitrary or capricious conduct, as they obviously must be if they are to serve the purpose for which the Board was created. *Utah Copper Co.* v. *Railroad Retirement Board*, 129 Fed. (2nd) 358 (C. C. A. 10), cert. denied 317 U. S. 687.

But a preliminary question arises and that is one of jurisdiction. Is the plaintiff an "employer" as defined by the Retirement Act and subject to the jurisdiction of the Board?

In *Utah Copper Co.* v. *Railroad Retirement Board, supra,* it was held that in the absence of a specific provision in the Act creating the Board, expressly lodging the decision of the jurisdictional question in the Board, its decision, even if supported by competent evidence, is not final and may be independently examined by a court of review, and that as the Railroad Retirement Act is silent on the power of the Board to pass upon the question of jurisdiction, its decision as to jurisdiction is subject to review. Cf. *Shields et al.* v. *Idaho Central Railroad Co.*, 305 U. S. 177; *United States et al.* v. *Idaho, et al.*, 298 U. S. 105; *Crowell* v. *Benson*, 285 U. S. 22; *Wichita R. R. et al.* v. *Public Utilities Comm., et al.*, 260 U. S. 48; *Ellis* v. *Railroad Retirement Board*, 132 Fed. (2nd) 636 (C. C. A. 2).

If the findings of fact which form the basis for the determination that Duquesne is an "employer" within Section 1(a) of the Retirement Act are supported by substantial evidence, it is clear from reading the Act and the Regulations promulgated under the Act that the Board has jurisdiction. Are these findings of fact supported by substantial evidence? It does not seem to me that the record substantiates the finding that Duquesne's operations are, and have been directly, both functionally and economically, related to Pennsylvania's transportation of property by railroad. I think the record rather warrants the findings made in the dissenting decision, which are to the effect that Duquesne has always represented itself as a separate distinct corporate entity, and has conducted its business as such separate corporate entity; nor does the record substantiate the findings that Duquesne is, and has been engaged in the non-casual operation of equipment and facilities, and the performance of non-casual service in connection with Pennsylvania's transportation of property by railroad. The record shows that Duquesne was engaged in these operations for its own corporate benefit.

Included in the essential findings of fact made by the Board are the following, the italicized parts of which are objected to by the plaintiff:

> "3. *Duquesne's operations are now and have been at least since August 28, 1935, intimately and integrally related to Pennsylvania's railroad transportation.* Duquesne has been primarily, principally and predominantly engaged in the storage, loading and unloading,

and other handling of goods transported over the lines of Pennsylvania, *being in substance an agency of Pennsylvania for such purposes.*

This finding is based on the evidence found in the record. [Pages 56-60, 83-86, 87-94, 105-106, 130-135, 165-166, 175-178.]

The Board bases its conclusion that Duquesne was an "employer" within the meaning of Section 1(a) largely upon the information obtained in its first questionnaire [R. 56-60]. Plaintiff urges that the questions in the questionnaire were ambiguous and the answers necessarily were vague and misleading, and this seems to be true particularly of question "6a". Plaintiff does state that it conducts operations in connection with Pennsylvania and in truth it does, but not in the manner indicated in the finding. The Board also based its finding on the Salvage Freight Contract of 1922 [R. 83-86] between Duquesne and Pennsylvania Railroad, but this evidence, if it substantiates any conclusion, supports the conclusion that Duquesne's acts were separate and segregated corporate operations. The Board also relies upon the agreement between Duquesne and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employe. [R. 87-94.] This might be significant were it not the fact that the evidence [R. 46, 107, 134] shows that Duquesne's employees are on the payroll of Duquesne and are under the sole supervision of Duquesne's superintendent; are not permitted free transportation on the Pennsylvania lines; are not entitled to become members of the Pennsylvania Railroad Voluntary Relief Department, or the Pennsylvania Employees Provident and Loan Association. These latter facts outweigh any inference to be drawn from the Brotherhood agreement. The Board further based its finding on the memorandum submitted by Duquesne in support of its position [R. 130-135] in which there is a recital of Duquesne's operations. But this does not show Duquesne's operations to be interwoven with Pennsylvania's. It rather tends to establish that Duquesne and Pennsylvania have always held themselves out as separate and distinct corporate entities and have conducted their affairs in that manner.

The facts which lead to this later conclusion are many, but to mention a few referred to in that memorandum: There is the establishment of Pennsylvania's segregated

freight agencies; Duquesne's and Pennsylvania's adherence to the loading and unloading requirements; the interchange of bills of lading and warehouse receipts; the fact that Duquesne or the owners have the sole control of the goods while the goods are in storage; and Duquesne's individual practice of subletting space to customers. Another element upon which the Board based its finding is two bills of lading [R. 165-166]. But the mere fact that a warehouse company affords storage in transit privileges does not lead to the conclusion that such warehouse is "intimately and integrally" related to the carrier, nor does the existence of the present Salvage Contract [R. 175-178] between Duquesne and Pennsylvania support such a finding. It shows a contractual relation.

In my opinion this finding No. 3 is not supported by substantial evidence.

> "4. *The two warehouses operated by Duquesne—one in Pittsburgh proper and the other at East Liberty in Pittsburgh—have been valuable links in the chain of Pennsylvania's railroad transportation.* They are owned by Pennsylvania and are operated by Duquesne under the lease from Pennsylvania. A portion of the ground floor of each warehouse is retained by Pennsylvania and used and officially designated by it as its 'freight agency'. Duquesne's warehouse, as well as Pennsylvania's 'freight agencies', are served by Pennsylvania's railroad tracks, and are equipped with platforms or sidings and other facilities for the receipt, delivery, and other handling of inbound and outbound freight."

The only evidence in the record to support this finding, consists of the two bills of lading [R. 155-156] and the "Transit in storage Rules" [R. 167]. There is no substantial evidence to justify this finding, which seems quite speculative.

> "7. *Duquesne also performed, during the period between August 1937 and May 1938 unloading, storing, and reloading services and other transit details at Erie, Pennsylvania, in connection with carload shipments of news-paper print entitled to storage-in-transit privileges under Pennsylvania's tariffs. These services were similar to those performed by Duquesne at East Liberty.*"

The plaintiff objects to the linking of "other transit details" with "in connection with". The objection is without merit.

"8. *Duquesne's position as an agency of Pennsylvania, available to provide such facilities and services as the latter requires, appears further from* Duquesne's handling, reconditioning, and selling for Pennsylvania, over freight, damaged refused freight, and damaged unclaimed freight under a contract originally entered into between the two companies on February 1, 1922, and superseded by a contract dated January 2, 1941. Pennsylvania transports to Pittsburgh any freight it desires to be disposed of by Duquesne and Duquesne removes such freight to its warehouse after the payment to Pennsylvania of all freight and other charges that may have accrued thereon. Out of the gross proceeds realized by it from each sale, Duquesne deducts a commission of 10 percent and any amounts paid by it for reconditioning, drayage, freight, and other charges, and turns the balance over to Pennsylvania. In the event that the gross proceeds of the sale of freight do not equal the expenses incurred by Duquesne, plus the 10 percent commission, Duquesne is credited with the difference. When any freight is returned by Duquesne to Pennsylvania upon the latter's order, Duquesne is reimbursed only for the actual expenses incurred by it plus storage charges. Under the original contract, if any lot of freight became so worthless as to be unsalable, Duquesne was required to dispose of it as directed by Pennsylvania. Under the new contract, Duquesne is given authority to dispose of such goods as it sees fit. The original contract also provided that if the owner of any unclaimed freight is ascertained prior to the sale of such freight, Duquesne was to deliver such freight, upon instructions from Pennsylvania, to the owner, and was to receive from the owner such charges as Duquesne has paid to Pennsylvania. The new contract provides that under such circumstances Duquesne shall, upon Pennsylvania's request, return such freight to Pennsylvania upon repayment of all charges thereon which Duquesne shall have paid to Pennsylvania."

Such a comprehensive finding that Duquesne is an "agency of Pennsylvania" and is "available to provide such facilities and services as the latter requires" is not warranted. The facts merely show the existence of a contractual agency for specifically agreed and limited purposes. The figures show that some 40 percent for 1936, 26 percent for 1937, 30 percent for 1938 of Duquesne's income was derived from various working agreements with Pennsylvania; they do show the "substantial extent" of Duquesne's source of income and that the income is "connected with" in a certain degree, to the transportation of goods by the Pennsylvania Railroad. However, the greater portion of Duquesne's income is derived from sources other than the Pennsylvania Railroad. Since the phrase "in connection with", as used in the Act, is limited to a specific meaning, the wording of this finding may well lead to a misconception of the true relationship of Duquesne's entire income to that portion derived from the business received from Pennsylvania Railroad Company, and I think plaintiff's objection is merited.

"13. *Duquesne's operations are, and have been at least since August 28, 1935 directly related, functionally and economically, to the performance of the transportation obligations which Pennsylvania has undertaken as a common carrier by railroad, and to the receipt, delivery, transfer in transit, storage, and handling of property transported by Pennsylvania railroad.*"

The effect of this finding is to make Duquesne a department in the Pennsylvania transportation system which is not warranted by the evidence in the record. Duquesne has always conducted itself as a separate distinct corporate entity. Duquesne's employees perform services solely for Duquesne and there is no interweaving of the services of the employees of Duquesne and those of Pennsylvania; they are on entirely different payrolls. Duquesne's employees are and have been recognized solely as employees of a warehouse and hence have never been granted the privileges that Pennsylvania's employees may have had. Duquesne was recognized as a member of the Warehouse Industry under the N.R.A. Code. Duquesne was recognized and paid accordingly, as a member of the General Social Security Plan and not as a member of the Special Railroad Security

System. It is true that Duquesne had working agreements with Pennsylvania and as a result realized a profitable income. In this way Duquesne's operations, in a limited degree, are directly related, functionally and economically, to Pennsylvania's transportation obligations. Such relationship, however, is only a result of contractual agreements, and not because of any functional and economical interweaving by Duquesne and Pennsylvania. The conclusion in this finding is not supported by the evidence.

"14. *Duquesne is, and has been at least since August 28, 1935, engaged in the non-casual operation of equipment and facilities and the performance of non-casual service in connection with Pennsylvania's transportation of property by railroad, other than trucking service, and the receipt, delivery, transfer in transit, storage, and handling of property transported by Pennsylvania by railroad.*".

From an analysis of the previous findings, it appears that there is no substantial evidence to support this finding.

The language of the Carriers Taxing Act of 1937, 45 U.S.C.A. § 261, et seq. in defining "employer" is identical with the language in the definition of "employer" in the Railroad Retirement Act, and it has been held to be a companion statute of the Railroad Retirement Act. *Railroad Retirement Board* v. *Alton*, 295 U. S. 330; *State of California* v. *Anglin*, 129 Fed. (2d) 455 (C. C. A. 9); *Allen* v. *Ocean S. S. Co. of Savannah*, 123 Fed. (2nd) 469 (C. C. A. 5). It has also been held that the administrator of the Carriers Taxing Act is without jurisdiction unless it be found that the company is an express company, sleeping car company, or carrier by railroad subject to Part I of the Interstate Commerce Act—no contention is made that Duquesne is any of these; or that it is a "company which is directly or indirectly owned or controlled by one or more of such carriers [subject to Part I of the Interstate Commerce Act] or under common control therewith, *and* "which operates any equipment or facility or performs any service * * * in connection with the transportation of passengers or property by railroad * * *". The requirements of the alternative conditions, namely control *and* operation in connection with the transportation of persons or property by railroad, are conjunctive and unless the company falls within both requirements, the administrative agency lacks

jurisdiction. *Walling* v. *Baltimore Steam Packet Co.*, 50 Fed. Supp. 639, 642. Cf. *Crowell* v. *Benson*, 285 U. S. 22; *Wichita R. R. et al.* v. *Public Utilities Comm. et al.*, 260 U. S. 58; *Louisville & Nashville R. R. Co.* v. *Finn, et al.*, 235 U. S. 601. It is conceded that Duquesne fulfills the requirement of control. However, since the finding that Duquesne "operates any equipment or facility or performs any service * * * in connection with the transportation of passengers or property by railroad" is not supported by the substantial evidence, Duquesne does not come within the requirements of an "employer" as defined by Section 1(a) of the Retirement Act; therefore it necessarily follows that the Retirement Board is without jurisdiction for one of the jurisdictional requirements of the Act is lacking.

Accordingly the plaintiff's motion for summary judgment is granted, and the motion of the defendant is denied.

Settle order on notice.

February 29, 1944.

(Sgd) HENRY W. GODDARD
U.S.D.J.

IN UNITED STATES DISTRICT COURT

JUDGMENT

Entered March 20, 1944

This action having been commenced by the filing of the complaint herein on May 18, 1943, and the defendant, Railroad Retirement Board, having filed its answer herein on July 21, 1943, and the Brotherhood of Railway and Steamship Clerks, Freight, Handlers, Express & Station Employees, and George M. Harrison, President of said Brotherhood, having intervened herein as defendants pursuant to order filed herein on September 24, 1943, and the plaintiff having moved this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment setting aside and in all respects annulling the action of the Railroad Retirement Board as set forth in its decision made and filed on February 11, 1943, on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to judgment as a matter of law; and the defendants having moved this Court pursuant to the afore-

said Rule 56 for summary judgment dismissing the complaint herein;

And said motions having duly come on to be heard before Honorable Henry W. Goodard, District Judge, on October 29, 1943, and due consideration having been had thereon, and the Court having filed its opinion herein on February 29, 1944, granting plaintiff's motion for summary judgment and denying defendants' motions for summary judgment; and the costs of the plaintiff having been duly taxed by the Clerk of this Court at the sum of $27.11;

Now on motion of Burlingham, Veeder, Clark & Hupper, attorneys for plaintiff, it is

Ordered that the motions made by the defendant and the intervening defendants for summary judgment be, and the same hereby are, denied; and it is further

Ordered that the plaintiff's motion for summary judgment be, and the same hereby is, granted and that the action and decision of the Railroad Retirement Board, as set forth in its decision made and filed on February 11, 1943, be and the same hereby is set aside and annulled; and it is further

Ordered and adjudged that the plaintiff, Duquesne Warehouse Company, having an office at Pittsburgh, Pennsylvania, have judgment on the issues herein on the merits against the defendant, Railroad Retirement Board, having its principal office at 844 Rush Street, Chicago, Illinois, and against the intervening defendants, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express & Station Employees, and George M. Harrison, President of said Brotherhood, having an office at Court and Vine Streets, Cincinnati, Ohio; and that said plaintiff recover of and from the intervening defendants aforesaid, jointly and severally, the sum of $27.11, its costs as taxed herein by the Clerk and that plaintiff have execution therefor.

Approved:

(Signed) HENRY W. GODDARD
U. S. D. J.

Judgment rendered this 20th day of March 1944.

(Signed) GEORGE J. H. FOILMER
Clerk of the United States District Court
for the Southern District of New York

NOTICE OF APPEAL OF DEFENDANT RAILROAD RETIREMENT BOARD

Filed June 14, 1944

Notice is hereby given that the Railroad Retirement Board, the defendant above-named, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the final judgment entered in this action on March 20, 1944.

Dated: June 10, 1944.

(Signed) JOSEPH H. FREEHILL
Joseph H. Freehill
General Counsel
And Attorney for Defendant
Railroad Retirement Board
844 Rush Street
Chicago 11, Illinois

To: BURLINGHAM, VEEBER, CLARK AND HUPPER
Attorneys for Plaintiff
27 William Street
New York 5, New York

MULHOLLAND, ROBIE AND MCEWEN
Attorneys for Intervening Defendants
Suite 1041 Nicholas Building
Toledo 4, Ohio
and

SAMUEL J. COHEN, ESQ.
Of Counsel
50 East 42nd Street
New York, New York

NOTICE OF APPEAL OF INTERVENING DEFENDANTS

Filed June 20, 1944.

Notice is hereby given that the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees, and George M. Harrison, President of said Brotherhood, intervening defendants above-named, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the final judgment entered in this action on March 20, 1944.

Dated: June 17, 1944.

WILLARD H. MCEWEN
/s/ WILLARD H. MCEWEN
Willard H. McEwen,
1041 Nicholas Building,
Toledo, Ohio.

SAMUEL J. COHEN
/s/ SAMUEL J. COHEN
Samuel J. Cohen,
50 East 42nd Street,
New York, New York
Attorneys for Intervening Defendants

To: BURLINGHAM, VERDER, CLARK AND HUPPER
Attorneys for Plaintiff,
27 William Street
New York 5, New York

JOSEPH H. FREEHILL,
General Counsel and
Attorney for Defendant
Railroad Retirement Board
844 Rush Street
Chicago 11, Illinois

STIPULATION AS TO CONTENTS OF RECORD ON APPEAL

Filed July 8, 1944

It is hereby stipulated and agreed by and between the parties hereto that the record on appeal herein shall consist of the following items:

1. Summons and complaint, omitting, however, Exhibits 1-15, inclusive, of the complaint.

2. Answer of defendant Railroad Retirement Board, with certified copy of Record before Railroad Retirement Board In Jurisdictional Docket No. 18—In The Matter of Duquesne Warehouse Company.

3. Motion of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and George M. Harrison, President of Said Brotherhood, For Leave To Intervene As Parties Defendant.

4. Answer of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and George M. Harrison, President of Said Brotherhood, Intervening Defendants.

5. Order granting motion of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and George M. Harrison, President of said Brotherhood, for leave to intervene as parties defendant, to file their answer, and to participate in all proceedings herein.

6. Plaintiff's notice of motion for summary judgment.

7. Notice of motion of defendant Railroad Retirement Board for summary judgment.

8. Notice of motion of intervening de. ndants for summary judgment.

9. Decision and opinion of Honorable Henry W. Goddard, District Judge.

10. Final judgment entered March 20, 1944.

11. Notice of appeal of defendant Railroad Retirement Board.

12. Notice of appeal of intervening defendants.
13. Stipulation as to contents of record on appeal.

Dated: 6/28 1944

(Signed) JOSEPH H. FREEHILL
Joseph H. Freehill
General Counsel and
Attorney for Defendant-
Appellant
Railroad Retirement Board
844 Rush Street
Chicago 11, Illinois

(Signed) WILLARD H. MCEWEN
Willard H. McEwen
1041 Nicholas Building
Toledo, Ohio

(Signed) SAMUEL J. COHEN
Samuel J. Cohen
50 East 42nd Street
New York, New York
Attorneys for Intervening Defendants-
Appellants

(Signed) BURLINGHAM, VEEDER, CLARK AND HUPPER
Burlingham, Veeder, Clark and Hupper
Attorneys for Plaintiff-Appellee
27 William Street
New York 5, New York

IN UNITED STATES DISTRICT COURT

MOTION FOR ORDER EXTENDING TIME FOR SERVING, CERTIFYING, AND FILING RECORD ON APPEAL AND DOCKETING ACTION

Filed July 14, 1944

Comes now the defendant-appellant Railroad Retirement Board, by its attorney, Joseph H. Freehill, General Counsel of the Board, and moves the Court for an order extending the last date for serving a copy of the record on appeal

upon the plaintiff-appellee Duquesne Warehouse Company, as required by Rule 31 of the Court's Civil Rules, from July 14, 1944 to August 14, 1944; extending the last date for filing copies of the appellate record with the Clerk of the Court and certification by him of a copy, as provided in the aforementioned Rule 31, to the tenth day following service of the record copy upon the plaintiff-appellee, if there is no motion to correct, or, if there is a motion to correct, to the fifth day following the order thereon; and extending the last date for filing the record on appeal and docketing the action in the United States Circuit Court of Appeals for the Second Circuit, in accordance with Rule 73(g) of the Rules of Civil Procedure for the District Courts of the United States, from July 24, 1944 to August 24, 1944.

(Signed) JOSEPH H. FREEHILL
Joseph H. Freehill
General Counsel and
Attorney for Defendant-Appellant
Railroad Retirement Board
844 Rush Street
Chicago 11, Illinois

We hereby consent to the granting of the above motion:

(Signed) BURLINGHAM, VEEDER, CLARK AND HUPPER
Burlingham, Veeder, Clark and Hupper
Attorneys for Plaintiff-Appellee
27 William Street
New York 5, New York

(Signed) WILLARD H. MCEWEN
Willard H. McEwen
1041 Nicholas Building
Toledo, Ohio

(Signed) SAMUEL J. COHEN
Samuel J. Cohen
50 East 42nd Street
New York, New York
Attorneys for Intervening Defendants-Appellants

Dated: July 13, 1944

ORDER EXTENDING TIME FOR SERVING, CERTIFYING, AND FILING RECORD ON APPEAL AND DOCKETING ACTION

Entered July 15, 1944

The defendant-appellant Railroad Retirement Board, by its attorney, has brought a motion for an order extending the last dates for serving a copy of the record on appeal upon the plaintiff-appellee Duquesne Warehouse Company, for filing copies of the appellate record with the Clerk of the Court and certification by him of a copy, and for filing the record on appeal and docketing the action in the United States Circuit Court of Appeals for the Second Circuit; the attorneys for the plaintiff-appellee and the attorneys for the intervening defendants-appellants have consented to the granting of the motion. Upon consideration thereof, it is this 15th day of July, 1944, ordered as follows:

That the last date for serving a copy of the record on appeal upon the plaintiff-appellee be and the same hereby is extended from July 14, 1944 to August 14, 1944;

That the last date for filing copies of the appellate record with the Clerk of the Court and certification by him of a copy be and the same hereby is extended to the tenth day following service of the record copy upon the plaintiff-appellee, if there is no motion to correct, or, if there is a motion to correct, to the fifth day following the order thereon; and

That the last date for filing the record on appeal and docketing the action in the United States Circuit Court of Appeals for the Second Circuit be and the same hereby is extended from July 24, 1944 to August 24, 1944.

(Signed) WILLIAM BONDY
Judge of the United States District Court
for the Southern District of New York

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed by and between the parties hereto that the foregoing is a true transcript of the record of the District Court in the above-entitled matter as agreed upon by the parties.

JOSEPH H. FREEHILL
General Counsel and
Attorney for Defendant-
Appellant
Railroad Retirement Board
844 Rush Street
Chicago 11, Illinois

WILLARD H. MCEWEN
1041 Nicholas Building
Toledo, Ohio

SAMUEL J. COHEN
50 East 42nd Street
New York, New York
Attorneys for Intervening De-
fendants-Appellants

BURLINGHAM, VEEDER, CLARK AND HUPPEL
Attorneys for Plaintiff-Appellee
27 William Street
New York 5, New York

[Clerk's Certificate to foregoing transcript omitted in printing]

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 138—October Term, 1944

(Argued January 8, 1945—Decided March 12, 1945)

DUQUESNE WAREHOUSE COMPANY, PLAINTIFF-APPELLEE

vs.

RAILROAD RETIREMENT BOARD, DEFENDANT-APPELLANT

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES, AND GEORGE M. HARRISON, PRESIDENT OF SAID BROTHERHOOD, INTERVENING DEFENDANTS-APPELLANTS

Before CHASE, HUTCHESON, and FRANK, Circuit Judges

On Appeal from the District Court of the United States for the Southern District of New York

Joseph H. Freehill and Myles F. Gibbons, General Counsel, David B. Schreiber, Ass't General Counsel, Railroad Retirement Board (Jacob Abramson and Louis Turner of counsel) for Appellant.

Burlingham, Veeder, Clark & Hupper (George R. Allen, Ray Rood Allen, Herbert Mayhew Lord, of counsel) for Appellee.

Mulholland, Robie and McEwen (William H. McEwen, Samuel J. Cohen, Frank L. Mulholland and Clarence M. Mulholland, of Counsel) for Intervening Appellants.

OPINION.

HUTCHESON, Circuit Judge:

Brought under Section 11 [1] of the Railroad Retirement Act of 1937, [2] the suit was to set aside an order of the Railroad Retirement Board [3] that plaintiff within the definition [4] of the Act was an

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[1] 45 U. S. C. A. Sec. 228k. "Court Jurisdiction.—An employee or other person aggrieved may apply to the district court of any district wherein the Board may have established an office or to the District Court of the United States for the District of Columbia to compel the Board (1) to set aside an action or decision of the Board claimed to be in violation of a legal right of the applicant or (2) to take action or to make a decision necessary for the enforcement of a legal right of the applicant. Such court shall have jurisdiction to entertain such application and to grant appropriate relief. The decision of the Board with respect to an annuity, pension, or death benefit shall not be subject to review by any court unless suit is commenced within one year after the decision shall have been entered upon the records of the Board and communicated to the person claiming the annuity, pension, or death benefit."

[2] 45 U. S. C. A. Sec. 228 (a) et seq.

[3] 45 U. S. C. A. Sec. 228j.

[4] 45 U. S. C. A. Sec. 228a Definitions:

"For the purposes of sections 228a–228r of this title—(a) The term 'employer' means any carrier (as defined in subsection (m) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage or handling of property transported by railroad, * * *"

employer. The claim was that the undisputed facts[*] establish as matter of law that plaintiff is not an employer as that term is defined by statute and that the Board's decision and order that it is not in accordance with law. On the Board's motion for summary judgment made on the complaint, the answer and the record made before it, there was a judgment for plaintiff ordering the action and decision of the board set aside and annulled. The Board has appealed.

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[*] So far as material, these are the facts:

(1) Though most of its principal officers are also officers of Pennsylvania, and its stock is, and has been, entirely owned by Pennsylvania, Duquesne is in no sense a department of Pennsylvania, but it is, and always has been, conducted as a separate corporate entity, and entirely separate from and independent of Pennsylvania.

(2) A public warehouse chartered to conduct a general storage and warehouse business, services which Penn. is not obligated to, and does not perform, it is engaged solely in the commercial warehouse business at Pittsburgh and East Liberty, Pa., and though a large part of its business consists in the warehousing, the loading, unloading, and other handling incident thereto, of goods which have been, or are to be, transported over the Pennsylvania lines, it is not a carrier, nor is it engaged at all in railroading. (3) Its business is conducted under the direction of its superintendent who has full and unrestricted authority to conduct a commercial warehouse business under its charter, and its facilities are available to, and are employed by, the public generally without restrictions to goods shipped over Penn. lines. (4) Its employees are employed by it, carried on its payroll, paid solely out of its funds, and discharged by it alone. Penn. has no authority over them and nothing whatever to do with them. They are not, they have not regarded themselves, and have never been regarded by the railroad company as, its employees. They are Duquesne's employees only. (5) The two warehouses operated by Duquesne at East Liberty and Pittsburgh, are owned by Penn., being operated by Duquesne under lease from Penn. A portion of the ground floor of each warehouse is retained by Penn. and used and officially designated by it as its 'freight agency'. Duquesne's warehouses, as well as Pennsylvania's "freight agencies', are served by Pennsylvania's railroad tracts and are equipped with platforms or sidings and other facilities for the receipt, delivery, and other handling of inbound and outbound freight.

(6) At the East Liberty warehouse, Duquesne handles and stores only one commodity, carload sugar, which comes in and goes out over Pennsylvania rails. The sugar is handled by Duquesne under storage-in-transit privileges permitted and covered by railroad tariffs filed by Pennsylvania with the Interstate Commerce Commission. Part of the sugar which passes through Duquesne's warehouse is refined in California and part in New York. That refined in California is moved by ship to one of the eastern ports, such as Philadelphia or Baltimore, and thence by rail to Pittsburgh; and that refined in New York is shipped by rail directly from New York to Pittsburgh. At Duquesne's warehouse, which is used as a distribution center, the packages of sugar are assembled in the proper numbers and sizes and then shipped out over Pennsylvania's lines for distribution. Incoming shipments are consigned to the owner care of Duquesne, the route being designated as 'Penn R. R. For Stge in Transit'; and outgoing shipments are consigned to the owner, the bill of lading having a transit record number and being marked 'accorded transit privilege at East Liberty, Pa.' Both the unloading of the sugar from, and its reloading into, Pennsylvania cars are performed by Duquesne at the latter's siding for the account of the shipper in accordance with the governing rail tariff (Consolidated Freight Classification No. 13) requiring owners to load and unload freight carried at carloading rates. In the case of incoming sugar, delivery is made by Penn. and receipt is taken by Duquesne when Penn. places the cars on Duquesne's siding, and Duquesne then unloads. In the case of outgoing shipments, the empty cars are placed by Pennsylvania on Duquesne's siding and loaded by Duquesne, which then receives Pennsylvania's bill of lading. The handling and storage charges are billed by Duquesne directly against the owners of the property and are paid by such owners.

(7) At its Pittsburgh warehouse, Duquesne is primarily, principally and predominantly engaged in the handling of freight which has come in, or is destined for movement, over Pennsylvania's rails, or which has both come in and is going out over Pennsylvania's rails. Approximately 95 percent of the commodities handled at that place, which commodities are diverse in character and are hauled in both carload and less-than-carload form, come in by rail, the remainder coming in by truck. The respective rail and truck percentages of the outgoing commodities are 60 and 40. The services performed by Duquesne at the Pittsburgh warehouse are similar to those at East Liberty insofar as carload freight is concerned, except that no sugar is handled. As to the less-than-carload freight, Duquesne, in addition to doing it, performs the handling involved in delivering it to and receiving it from Pennsylvania's platform. The loading and unloading of less-than-carload freight is performed by Penn. at its platform. In the case of incoming less-than-carload shipments, the freight is unloaded by Penn. from the cars to its platform and is delivered to and received by Duquesne on such platform. In the case of outgoing less-than-carload shipments, Duquesne delivers the freight unto Pennsylvania's platform. Penn. then issues its bill of lading, loads the freight into the cars, and moves them out. Of the total space used by Duquesne at its warehouses at East Liberty

While we agree with the Board that the case presents no genuine issue as to any material fact, we cannot agree that these facts demanded a judgment in its favor. Indeed, we think it plain that they demanded a judgment for plaintiff. The facts on which Board and Court based their exactly opposite conclusions of law were furnished entirely by plaintiff in response (a) to the Board's questionnaire which formed the basis of the opinion originally issued by the Board's general counsel, and later adhered to by two members of the Board, that plaintiff is an employer; (b) plaintiff's additional memorandum filed with the Board September 15, 1939, and (c) its statement of facts filed February 14, 1940. These, without contradiction or inconsistency of any kind, establish that Duquesne is not a carrier but a commercial warehouseman, that it does not perform any transportation service of any kind, that the services it performs are not services which Pennsylvania, as a carrier, is obligated or has contracted to perform, and that, though Pennsylvania owns all of its stock, it is operated not as a department of Penn., but as a distinct corporate entity entirely and completely independent of Pennsylvania. It is conceded that but for the fact that Penn. owns its stock, there would not, there could not, be any claim made that the service Duquesne performs brings it within the statutory definition of "employer." The dispute between it and the Board turns on whether it operates its two warehouses "in connection with the transportation of * * * property by railroad or in receiving, delivery, storage, or handling of property transported by railroad." It is not disputed that, though it does a general commercial warehouse business, without restriction to goods which have moved or will move on the Pennsylvania lines, the major part of the goods handled by Duquesne have been, or are to be, transported on those lines, and that its operations are convenient and beneficial to the railroad and its patrons. Neither is it disputed that what Duquesne does is in discharge of its own obligations and not at all of any obligation imposed upon, or assumed by the carrier. It thus appears that the point of difference between Duquesne and the Board is that the

and Pittsburgh, approximately 30 percent was devoted to the handling of freight accorded storage-in-transit privileges in 1936; approximately 12.5 percent in 1937; and approximately 13.5 percent in 1938.

(8) Duquesne handles, reconditions and sells for Penn. over freight, damaged refused freight, and damaged unclaimed freight under a contract entered into between the two companies on Feb. 1, 1922. Pursuant to this contract Penn. transports to Pittsburgh any freight it desires to be disposed of by Duquesne and Duquesne removes such freight to its warehouse after the payment to Penn. of all freight and other charges that may have accrued thereon. Out of the gross proceeds realized by it from each sale, Duquesne deducts a commission of ten percent and any amounts paid by it for reconditioning, drayage, freight and other charges and turns the balance over to Pennsylvania. If the owner of any unclaimed freight is ascertained prior to the sale of such freight, Duquesne delivers such freight, upon instructions from Pennsylvania, to the owner and receives from the owner such charges as Duquesne has paid to Pennsylvania. In the event that the gross proceeds of the sale of freight do not equal the expenses incurred by Duquesne, plus the ten percent commission, Duquesne is credited with the difference. If any lot of freight becomes so worthless as to be unsalable, Duquesne disposes of it in such manner as Penn. directs. When any freight is returned by Duquesne to Penn. upon the latter's order, Duquesne is reimbursed only for the actual expenses incurred by it.

Board insists that though Duquesne, the warehouseman, operates entirely independently and not as a department of Penn., the statute is satisfied by proof, that its operations are availed of by Penn.'s customers, that they are concerned largely with goods which have been, or will be, transported, and that it is an advantage to Penn. to have a warehouse conveniently located with reference to its lines, while Duquesne insists that the statute is satisfied only when the storage, etc. is done by or for the carrier in discharge of the carrier's obligations. Coming more pointedly to it, Duquesne insists that the words of the statute, "in connection with the transportation of property by railroad or the receipt, delivery, etc., of property transported by railroad" required that the acts, which the statute sets out as definitive, be done by, or for, the carrier in discharge of the carrier's obligations imposed upon it, by law or by contract, in connection with its transportation of the property, that is, while the carrier's obligations are in course of being performed, while the Board reads the statute as though it covered acts done by or for the owner of the property before the carrier's obligation has attached or after it has been satisfied. If the Board is right, then mere ownership by a carrier of the controlling stock interest in a warehouse company which stores freight which has been or is to be transported by rail will convert that company into a carrier employer with the result that of two warehouse companies operating side by side performing the same service, storing freight which has been or is to be transported by rail, for the same customers, one will be an "employer," the other will not, according to whether its stock is, or is not, owned by a railroad company. We think it quite plain the words of the statute considered in themselves and especially in the light both of its purpose and of the legislative history made in the course of its enactment, completely negative this view. They make it plain that the critical words "in connection with the transportaton of property and of property transported by railroad" are used to denote transit and cover acts done only by or for the carrier while its obligations persist. We, therefore, agree with Duquesne that the judgment was right and that it should be affirmed. The same definition appears in the Carrier's Taxing Act [6] and in the Railroad Unemployment Insurance Act.[7] The Railway Labor Act,[8] as amended, carries substantially the same definition. Yet no one has claimed that Duquesne is subject to its terms.

Further, in litigation over the meaning of the definition when used in the Carriers' Taxing Act, the courts have uniformly repudiated the construction now placed by the Board in favor of the

[6] 50 Statutes, 435.
[7] 52 Statutes, 1094.
[8] 48 Statutes, 1185.

one we take.[9] But, says the Board in effect, the question is not what the courts think the act under construction here means, it is what the Board thinks it means, and the Board has spoken. Thus by virtue of being constituted the Board to administer the act, the Board has been endowed with a prescience, invested with a prepotence, in respect of statutory construction to which the courts must bow, though the facts are undisputed and the question is entirely one of law. Thus by the simple expedient of having a lawyer, under the dignified name of General Counsel for the Board issue an opinion and then adhering by a bare majority to that opinion, the Board is enabled to read the statute as it will. When the same general course was pursued by the administrator, and the same heresy was advanced in Fleming v. Belo,[10] the Courts had no difficulty in rejecting the claim. We find no difficulty in rejecting it here. None of the authorities [11] the Board cites sustain its position. Board v. Hearst, one of the cited cases, at page 130, correctly states the rule:

"Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty it is to administer the questioned statute. Norwegian Nitrogent Products Co. v. U. S., 288 U. S. 294; United States v. American Trucking Ass'n., 310 U. S. 534; Niagara Falls v. Federal Power Comm., 137 F. (2) 787."

In Fleming v. Belo, the Fifth Circuit Court of Appeals pointed out that the great fallacy in the doctrine pressed in that case and generally by administrative absolutists that recent administrative construction of a statute, consisting of the legal opinion of the administration's general counsel, is entitled to great weight. This court, in Niagara Falls v. Federal Power Co., 137 F. (2), 792, spoke to the same effect:

"The conventional reason for the deference exacted from courts for such rulings has always been the advantage possessed by such tribunals in the background of specialized experience and understanding, gathered from a long acquaintance of the members with the subject matter, either while they are in office or before. The continuity of this experience is assumed to build up an acquaintance inaccessibly to others—courts included. If so, a single ruling, made shortly after the tribunal has been set up, should have far less weight than a series of repeated rulings over a course of years."

[9] Ocean Steamship Co. of Savannah v. Allen, 126 F. (2) 469; Magruder v. Baltimore, 144 F. (2) 130.

[10] 121 F. (2) 213; Affirmed 316 U. S. 624.

[11] Board v. Hearst Publications, 322 U. S. 111, 130–131; Endicott Johnson Corp. v. Perkins, 317 U. S. 501; Swift & Co. v. United States, 316 U. S. 216; Gray v. Powell, 314 U. S. 402; South Chicago Co. v. Bassett, 309 U. S. 251; Rochester Telephone Corp. v. United States, 307 U. S. 125; Eilers v. Railroad Retirement Board, 132 F. (2) 636 (C. C. A. 2d, 1943); South v. Railroad Retirement Board, 131 F. (2) 748 (C. C. A. 5th, 1942), cert. den. 317 U. S. 701.

The very structure of our institutions, the very sources from which they derive, the judicial section of the Constitution itself all concur to make it crystal clear why Congress has never given, why it could not constitutionally give to the construction of a statute by the General Counsel of an administrative body or by the body itself, controlling weight, and that the "appropriate weight" which the courts give to such construction is that which is not inconsistent with settled Constitutional doctrine. The heresy eagerly advanced by some devotees of the administrative, as opposed to the judicial, process,[12] and sometimes tolerated, sometimes toyed with judicially, that giving "due weight" means the surrender of the judicial office of interpreter of statutes, has never had official sanction.[13] Perhaps it has never been better negated, the true rule better stated, than by this court:

"In spite of the plentitude of discussion in recent years as to how far courts must defer to the rulings of an administrative tribunal, it is doubtful whether in the end one can say more than that there comes a point at which the courts must form their own conclusions. Before doing so they will, of course—like the administrative tribunals themselves—look for light from every quarter, and after all crannies have been searched, will yield to the administrative interpretation in all doubtful cases; but they can never abdicate. Even Gray v. Powell, 314 U. S. 402, 62 S. Ct. 326, 86 L. Ed. 301—a case which perhaps went as far as any other—left no doubt as to this. Mitchell v. U. S., 313 U. S. 80, 97, 61 S. Ct. 873, 85 L. Ed. 1201." Niagara v. Power Co., 137 F. (2) at 792.

And this is bound to be so for the very foundation stone of our liberties is the fact that judges without interest in the result are to determine and apply the law, as old Hooker put it, "with all indifferency."[14] When then a person, claiming to a third person, that is, neither a carrier nor an employee, aggrieved by a decision of a majority of the Board, applies to the courts to have that decision set aside, "as in violation of a legal right," the contention

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[12] Judging as Administration, Administration as Judging, Texas Law Review, November 1942.

[13] Said Justice Brandeis, dissenting in St. Joseph Stock Yards Co. v. U. S., 298 U. S. 38, "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law applied." Cf. Board v. Hearst, supra; Niagara v. Power Co., supra.

[14] "We cannot be ignorant how much our obedience unto law dependeth upon this point. And so it is that 'notwithstanding even they which brook it worst that men should tell them of their duties, when they are told the same by law, think well and reasonably of it.' For why? They presume that the law doth speak with all indifferency, that the law is, as it were, an oracle proceeding from wisdom and understanding."

Buchanan, in 1579, said: "The maker of the law is the people, acting through a council of representatives, chosen from all classes, and the interpreter of the law should be not the king, but a body of independent judges."

While Locke declared that law is a definite, certain, known or knowable rule of action, in existence before, not after, the event, justly and impartially applied by known and indifferent judges, with authority to determine all differences according to established law.

that the Board, constituted as this one was, with two of its three members appointed on a partisan basis,[15] is endowed with any peculiar prescience in divining the meaning of a term so precisely defined by statute, must be supported by something more than the mere claim. A search of the statute and particularly of 228k, the section relating to court jurisdiction, reveals nothing in support. More it discloses that the statute does not prescribe finality for even the Board's conclusions of fact, and that for such finality as they have, the Board must rely entirely on the principle supporting administrative fact findings.[16] When we turn from the statute to the courts, we find no case which at all supports the claim made here that where a statute has defined a term, courts must, though they do not agree with it, follow the administrator's opinion as to its meaning. The opinion in Labor Board v. Hearst, the case mainly relied on here, makes clear the difference between that case and this. Pointing out that Congress, without defining it, had used a broad term "employees" broadly, leaving to the Labor Board to determine its application in particular situations, the Court said,

"But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited."

Citing decisions of similar purport, it then concludes:

"the board's determination * * * is to be accepted if it has 'warrant in the record' and a reasonable basis in law."

Here Congress did not use the term "employer" broadly. On the contrary, it gave it a precise, a definite meaning. In this situation, the preceding sentence in the Hearst opinion, "Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute," furnishes the guiding rule. The application of that rule requires an affirmance of the judgment. It is accordingly affirmed.

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[15] "* * * One member shall be appointed from recommendations made by representatives of the employees and one member shall be appointed from recommendations made by representatives of carriers, in both cases as the President shall direct, so as to provide representation on the Board satisfactory to the largest number, respectively, of employees and carriers concerned. One member, who shall be the chairman of the Board shall be appointed initially for a term of two years without recommendation by either carriers or employees and shall not be in the employment of or be pecuniarily or otherwise interested in any employer or organization of employees. * * *" 45 U. S. C. A. Sec. 228l.

[16] South v. Railroad Retirement Board, 131 F. (2) 748.

DISSENTING OPINION

FRANK, *Circuit Judge*, dissenting:

Judge Hutcheson charges the Board with advocating "heresy." Perhaps because of Judge Hutcheson's eager interest in heresy-hunting, his opinion here blurs the issues by inaccurately (but doubtless inadvertently) stating the Board's position before condemning it. In order to make clear my reasons for dissenting, I shall try to state the issues more precisely.

1. The first section of the Railroad Retirement Act,[17] defines "employer" to mean (a) any carrier of a designated character [18] or

(b) any noncarrier company if the noncarrier
(1) is "owned or controlled by" such a carrier,
and also
(2) "operates any equipment or facility or *performs any service* (except trucking service, casual service, and the casual operation of equipment or facilities) *in connection with the transportation* of passengers or *property by railroad*, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad." [19]

The Board, after a hearing (conceded by appellee warehouse company to have been fairly and properly conducted) decided, on the basis of the undisputed facts in the record before it, that appellee had the two specified statutory attributes of such a noncarrier employer, i. e., (1) its stock was wholly owned by railroad carrier and (2) it performed services "in connection with the transportation * * * of property by railroad."

2. No one disputes the fact that, since appellee's incorporation in 1906, all its stock has been "owned and controlled" by the Pennsylvania Railroad and that most of appellee's principal officers have been officers of the Pennsylvania. The only dispute is as to whether, on the admitted facts, appellee's activities are such that the Board could properly decide that appellee renders services "in connection with the transportation of property by [the Pennsylvania] railroad." The pertinent facts bearing on that issue are, briefly, as follows:

The Board, in its opinion, cited and quoted from B. & O. R. R. Co. v. United States, 305 U. S. 507, 516–517, as showing that it is well known that the average large railroad owns or controls a subsidiary or affiliated warehouse company with warehouses adjacent to the railroad's tracks, not as a mere investment, but to increase traffic over the railroad's lines by inducing shippers to use the road's "particular rail facilities." [20] Initially, this policy involved

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[17] 45 U. S. C. A. § 228a.

[18] A carrier is defined in the Act as an express company, sleeping-car company or carrier by railroad subject to Chapter 1 of Title 49.

[19] Italics added.

The statute also defines "employer" to include certain other persons, but those provisions have no pertinence here.

[20] Cf. Propriety of Operating Practices—New York Warehousing, 198 I. C. C. 134; 216 I. C. C. 291.

the supplying of warehouse services by the railroads at figures below cost, a practice which the Interstate Commerce Commission subsequently prohibited. But the convenience to shippers of what the Supreme Court called "accessorial services of the carriers, accurately designated commercial warehousing,"[21] and the resultant advantages to the several railroads in attracting rail shipments to their respective lines, have led to the continued rendering of such warehouse services by railroad-owned warehouse companies. The facts here make it clear that the Pennsylvania organized appellee, and that appellee's activities are now conducted, as a part of just such a railroad policy, i. e., to aid the Pennsylvania in seeking to increase the transportation of goods over its railroad system.[22]

The major part of appellee's business consists of the warehousing loading and unloading (and other conduct incident thereto) of goods which have been, or are to be, transported over the lines of the Pennsylvania. The warehouses which appellee operates were constructed and are owned by the Pennsylvania. Those Pennsylvania-owned warehouses, located in the same buildings with the Pennsylvania's freight agencies, are highly convenient for use as distribution points by shippers who transport their goods over the Pennsylvania's railroad lines. In actual practice, nearly all the property handled by appellee is transported inbound or outbound or both over the Pennsylvania's rails. Appellee stores a large part of such property while it is in the course of suspended through-interstate-shipment under storage-in-transit privileges published in the Pennsylvania's tariffs. Appellee also handles, reconditions and sells, for the Pennsylvania, damaged refused freight and damaged unclaimed freight. Thereby Pennsylvania is able to collect freight and other charges on unharmed freight and to recoup losses on goods damaged in transit.

On the basis of these facts (which I have stated in summary manner), the Board found that appellee's operations are "closely related, functionally and economically" to the "transportation of property by railroad." Accordingly, the Board decided that appellee is an "employer" within the meaning of the first section of the Act.

3. The Board in its opinion, and in its briefs and oral arguments in this court, has not contended that its interpretation of the Act, without regard to its reasonableness, binds the courts. Far more modestly, the Board contends thus: Its interpretation has no final-

[21] 305 U. S. at 516.

[22] In its opinion the Board said: "It may be noted that warehousing activities like those of Duquesne are conducted by numerous railroads throughout the United States, either directly or through subsidiaries, as an incident to their railroad transportation service, because by providing such services, railroads are able to induce shippers to use their rail facilities and thereby increase the volume of traffic over their respective lines. * * * And it has been recognized that such warehousing facilities are conducted for the same purpose and achieve the same results, whether they are conducted directly by the railroads or by subsidiaries of the railroads."

ity; a person adversely affected by the Board's decision must, of course, be afforded an opportunity to have some court decide whether an erroneous rule of law has been applied; if only one reasonable interpretation is open, that court must adopt it, regardless of the Board's view. But, if more than one reasonable interpretation is possible, the court must accord considerable weight to the Board's interpretation, made as a necessary adjunct of the Board's administrative decision rendered after an administrative hearing; the court must then accept the Board's interpretation if it is reasonably permissible. I agree with this contention. Approaching the statute in this manner, I think that, for reasons I shall state later, the Board's interpretation should be sustained because it is not unreasonable, even if an alternative interpretation might also be reasonable.

4. My colleagues do not deal with the Board's modest contention: They do not consider whether the Board's construction of the Act is reasonably permissible and therefore to be followed by us. Instead, they hold that no more weight can be judicially accorded the Board's interpretation than if it were (a) part of an argument advanced by an ordinary private litigant in a suit involving the meaning of the statute, or (b) the interpretation of the statute by a lower court or (c) of a court in another jurisdiction in another unrelated suit involving this statute. My colleagues therefore proceed to their own independent construction of the Act, without attaching any peculiar significance to the Board's, and, on that basis, conclude that the Board erred.

I think that, in the light of the Supreme Court decisions, my colleagues are wrong in their approach. Because of those Supreme Court decisions, I think that, even if the Board's construction of the Act had not been embodied in a decision reached after an administrative hearing, the courts would be obliged to give more respect to that construction than to that of an ordinary litigant, a lower court, or a court in another jurisdiction. I shall discuss this subject in some detail not merely because of its bearing on the instant case but for fear that, unless I do, the views here expressed by Judge Hutcheson may be taken as indicating the position of this Circuit in dealing with administrative agencies generally.

In arriving at his conclusion, Judge Hutcheson, speaking in the instant case for this court, repeats and relies upon the reasoning which, speaking for the Fifth Circuit, he employed in a dictum some four years ago in Fleming v. A. H. Belo Corp., 121 F. (2d) 207, 213, a case involving a statutory interpretation by the Wage

and Hour Administrator.[23] But, significantly, Judge Hutcheson, in his opinion in the instant case, refrains from mentioning Skidmore v. Swift & Co., 323 U. S. 134 in which, a few weeks ago, the Supreme Court, unanimously reversing the Fifth Circuit,[24] flatly rejected that reasoning. There, in an action brought by the Wage and Hour Administrator to enforce the Fair Labor Standard Act, the Supreme Court said (per Mr. Justice Jackson): "Congress did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act. Instead, it put this responsibility on the courts. Kirschbaum v. Walling, 316 U. S. 517, 523. But it did create the office of Administrator, impose upon him a variety of duties, endow him with powers to inform himself of conditions in industries and employments subject to the Act, and put on him the duties of bringing injunction actions to restrain violations. Pursuit of his duties has accumulated a considerable experience in the problems of ascertaining working time in employments involving periods of inactivity and a knowledge of the customs prevailing in reference to their solution. From these he is obliged to reach conclusions as to conduct without the law, so that he should seek injunctions to stop it, and that within the law, so that he has no call to interfere. He has set forth his views of the application of the Act under different circumstances in an interpretative bulletin and in informal rulings. They provide a a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it. Wage and Hour Division Interpretative Bulletin No. 13 [pp. 137–138]. There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions. And, while we have given them notice, we have had no occasion to try to prescribe their influence. The rulings of this Administrator are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact. They are not, of course, conclusive,

[23] The Supreme Court affirmed the decision in the Belo case, but it did not adopt Judge Hutcheson's dictum; it rested its decision, in effect, on the ground that the Administrator's interpretation was clearly at variance with the legislative intention. Walling v. Belo Corp., 316 U. S. 624. On the very day of its Belo decision, the Supreme Court, in Overnight Motor Transportation Co. v. Missel, 316 U. S. 572, 580 note 17, said that the Wage and Hour Administrator's "interpretative bulletins . . . carry persuasiveness as an expression of the view of those experienced in the administration of the Act and acting with the advice of a staff specializing in its interpretation and application." That ruling is surely at variance with Judge Hutcheson's dictum.

That dictum criticized the following statement of the Supreme Court in United States v. American Trucking Associations, 310 U. S. 534, 549, with reference to recent administrative interpretations of a new and untried statute: "In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" Despite Judge Hutcheson's adverse comment, the Supreme Court has subsequently in several cases cited this criticized passage. See, e. g., Overnight Motor Co. v. Missel, 316 U. S. 572, 581; Noble v. United States, 319 U. S. 88, 93; Colgate Co. v. United States, 320 U. S. 422, 426; N. L. R. B. v. Hearst Publications, 322 U. S. 111, 131.

[24] 136 F. (2d) 112 (C. C. A. 5).

even in the cases with w[illegible] they directly deal, much less in those to which they apply only by analogy. They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do. But the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. They do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons. The fact that the Administrator's policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect. This Court has long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of adversary origin. We consider that the rulings, interpretations, and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control" [pp. 139–140]. I find it impossible to reconcile that opinion with what Judge Hutcheson said in the Belo case or says in his opinion here.

It surprises me that the mild doctrine of the Skidmore case should be regarded as heresy.[25] It scarcely deserves Judge Hutcheson's eloquent denunciation, adorned with quotations from the writings of George Buchanan (1506–1582),[26] Richard Hooker (1554–1600)[27] and John Locke (1632–1704).[28] Judge Hutcheson might more pertinently have quoted from a more recent English

[25] In the Belo case, Judge Hutcheson overstated the Administrator's contention before denouncing it. And, in the instant case, he has similarly overstated the Board's contention before lampooning it.

[26] Buchanan's book, De jure regni apud Scotos, was written in 1579 for the instruction of the future King James I of England. Previously, Buchanan had assisted at the trial of James' mother Mary Queen of Scots; we are told that "it must be admitted that Buchanan was a willing agent in Moray's disingenuous handling of the case against the Queen." 4 Encyc. Britannica (1943) 310.

[27] "The main object of" Hooker's book, The Laws of Ecclesiastical Polity, written in the latter part of the 16th century, "was to show that the Puritans, in refusing obedience to the established church, were implicitly denying the foundations of all political obligations." It "was the last great statement of what might be called the medieval tradition, before that tradition was snapped by the stresses and strains of civil war." It was a "defense of the royal leadership of the national church. * * *" Sabine, A History of Political Theory (1937) 439, 443.

[28] Locke, writing at the end of the 17th century, defending the revolution of 1688, urged, as essential, a separation of governmental functions into the legislative,

writer, J. Toulmin Smith, who in 1849, in his book Government by Commission, warned his countrymen that "the blighting influence of Commissions" granted powers in violation of fundamental law, "has so overspread the land * * * that total subversion of all free institutions and of all free spirit of enterprise has been reached."[29] But as Cavers observes,[30] England, which did not heed Smith's warnings, and which indeed subsequently extended the powers of Commissions, managed to survive for many decades"; in fact, in the forty years following Smith's disregarded Jeremiad, England rose to the height of her pros-

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the executive and the "federative" function (the latter being the treaty-making or "foreign office" function).

However, he went further than in this country we would go, in suggesting that discretion must be vested in the executive, saying that "many things there are which the law can by no means provide for, and these must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage should require * * *. This power to act according to discretion for the public good, without the prescription of the law and sometimes even against it, is that which is called the prerogative. * * *" Because, among other things, "it is impossible to foresee and so by laws to provide for all accidents and necessities that may concern the public, or make such laws as will do no harm if they are exercised with an inflexible rigor on all occasions and upon all persons that may come in their way, therefore there is a latitude left to the executive power to do many things which the laws do not prescribe." Locke's second Treatise Concerning Civil Government (1690) Chapters XII and XIII.

In the 18th century English government, which corresponded roughly to Locke's formula, there was by no means a rigid separation of powers. Holdsworth, History of English Law, X, 720 (1938). Holdsworth says that Lévy-Ullman is quite correct in noting that England "is not the classic country of the separation of powers," and that "each unit of government has of its own characteristic expression without ceasing to retain some of the features of the others"; he also endorses Halévy's comment that in the 18th century "the British government was not a government in which all the powers were clearly distinguished. It was rather a government in which all the constituent parts were confused and in which all the powers mutually encroached." And Holdsworth goes on to say: "We have seen that, in the sphere of local government, the distinction between the three different functions of government did not exist; that quarter and petty sessions, in town and country alike, exercised legislative, executive and judicial functions; and that the functions of many of the other units of local government were equally amorphous. It was the same with the central government. The Crown was and still is an essential part of the Legislature; and, in the eighteenth century, the Crown was able, wherever it wished to do so, both to initiate legislation, and to exercise a considerable influence on the content of bills pending in the two Houses of Parliament. The House of Lords," which acted as a court, "was and still is a part of the legislative machinery of the state. Some of the privileges of the House of Commons gave and still give it some of the characteristics of a court of law * * *. The Lord Chancellor was, and still is, a judge, a member of the House of Lords, and a minister; in at least one instance, the Lord Chief Justice of the King's Bench had been a member of the cabinet."

[29] Smith inveighed against those who, ignoring "fundamental law," were "striving to obtain all arbitrary power over every species of property, public and private, under the cloak of 'Commissions' * * *. By the fundamental law * * * every possible precaution is taken against the person or property of any man becoming the victim, under any pretext whatever, of any arbitrary caprice or prejudice * * *. The blighting influence of Commissions has so overspread the land * * * that the total subversion of all free institutions and of all spirit of enterprise and energy has been reached * * *. All such Commissions * * * have * * * the same and necessary tendency and result of introducing an arbitrary power and government * * *. They are purely arbitrary instruments of irresponsible and despotic power." To Commissions "are daily being more and more given over, the arbitrary management and control of the properties and liberties of Englishmen * * *. There now exist in this country many courts (Commissions) * * * as illegal and arbitrary as the Court of Star Chamber * * *. Parliament itself will soon be reduced to be little more than the register of the decrees of an absolute government * * *. Many of its essential functions are now openly attempted to be discharged * * * not by the common council of the whole nation, elected by the nation, but by a few belonging to a special clique, and selected by the ministers of the crown * * *. What is wanted is the unfettering of all individual effort; the taking off of those trammels that bind down skill and enterprises and all self-depending energies, and are daily binding them down harder * * *. If this country is to maintain its position, if it is to be secure against such scenes as the nations of Continental Europe have beheld during the past year * * * some must be found who, taking their stand on the Fundamental Laws and Institutions of the land, shall thus achieve that first and most essential step by which this country shall be relieved from the now all-prevailing incubus of Government by Commissions."

[30] 47 Yale L. J. (1938) 675, 678.

perity while winning the admiration of all lovers of democracy for the liberty-cherishing character of her domestic institutions.

The Skidmore doctrine is not new.[31] The Supreme Court had previously said much the same, although somewhat more elliptically, as to the Wage and Hour Administrator,[32] and at length—but with more emphasis—as to other administrative officers and agencies when engaged in interpreting statutes in connection with decisions made after administrative hearings.[33]

Even before the Supreme Court had thus plainly spoken, this court, more than six years ago, in S. E. C. v. Associated Gas & Electric Co., 99 F. (2d) 795, 798 (C. C. A. 2), when sustaining an administrative statutory interpretation, had said (per Judge A. N. Hand): "Moreover, we are dealing with a new act the administration of which is the peculiar function of the Securities and Exchange Commission. One of the principal reasons for the creation of such a bureau is to secure the benefit of special knowledge acquired through continuous experience in a difficult and complicated field. Its interpretation of the Act should control unless plainly erroneous. In no other way can the objects of the Act be attained without constant and disconcerting friction. Norwegian Nitrogent Products Co. v. United States, 288 U. S. 294, 315."

Judge Hutcheson, in support of his position, cites and quotes a truncated portion of our opinion in Niagara Falls Power Co. v. Federal Power Commission, 137 F. (2d) 787, 792 (C. C. A. 2); but in that case, where an initial statutory interpretation by a Commission had later been rejected by it, we accepted the subsequent administrative interpretation, saying (p. 792): "Indeed, the very reason which forbids a court from lightly overruling an administrative ruling, a fortiori forbids its undertaking to say that a later ruling is mistaken when it reverses the earlier one. We must assume that continued occupation with the subject has disclosed the past error better than we can do ourselves."

In this circuit, recognizing the Supreme Court as the authoritative head of the federal judicial hierarchy, we have heretofore felt obligated, as an intermediate tribunal, to follow the rulings of that Court whether or not any members of this court happened to like those rulings.[34] Consequently, I do not feel it necessary to defend

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[31] In 1877, the Supreme Court said in United States v. Moore, 95 U. S. 760, 763: "The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. Edwards v. Darby, 12 Wheat. 210; United Sates v. The State Bank of North Carolina, 6 Pet. 29; United States v. MacDaniel, 7 id. 1. The officers concerned are usually able men, and masters of the subject."

[32] See, e. g., Overnight Motor Co. v. Missel, 316 U. S. 572, 580 note 17; United States v. American Trucking Associations, 310 U. S. 534, 549.

[33] See, e. g., Gray v. Powell, 314 U. S. 402; N. L. R. B. v. Hearst Publications, 322 U. S. 111, 130–131.

[34] We have often accepted Supreme Court doctrines of which we were critical. See, e. g., Wallace v. U. S., 142 F. (2d) 240, 243 (C. C. A. 2); Hammond-Knowlton v. U. S., 121 F. (2d) 192 (C. C. A. 2).

We have also said that it is our duty to follow "doctrinal trends" clearly manifest in Supreme Court decisions. See L. Hand, J., in Picard v. United Aircraft Corp., 128 F. (2d) 632, 636 (C. C. A. 2); Zalkind v. Scheinman, 139 F. (2d) 895, 903 (C. C. A. 2); Cf. Choate v. Commissioner, 129 F. (2d) 684, 686 (C. C. A. 2).

the Supreme Court against charges of heresy; for I think we must bow to its determinations even if, perchance, we should find Judge Hutcheson's political philosophy and heresiography more attractive.[35]

I note in passing that in this Circuit we have not believed that the Supreme Court has suggested that we submit to "administrative absolutism,"[36] and consequently we have not hesitated to protect the legal rights of citizens when administrative officers have acted in excess of their statutory powers. See, e. g., Goldman v. American Dealers Service, 135 F. (2d) 398 (C. C. A. 2); United States v. Downer, 143 F. (2d) 125 (C. C. A. 2); The Truth Seeker Company, Inc. v. Durning, — F. (2d) — (C. C. A. 2, January 18, 1945); In the Matter of New York, New Haven & Hartford Railroad Company, — F. (2d) — (C. C. A. 2, January 2, 1945); Bowles v. Sacher, 146 F. (2d) 186 (C. C. A. 2).

The Skidmore case should constrain us to respect the Board's statutory interpretation, even if the Board had merely the statutory authority of the Wage and Hour Administrator. But the Board's authority is greater. As noted in the Skidmore case, the Wage and Hour administrator is not empowered, ordinarily to hold an administrative hearing before he brings a suit to enforce the Fair Labor Standard Act.[37] But, unlike that Administrator, the Retirement Board is authorized and directed by Congress to make administrative decisions in specific cases. True, the Retirement Act does not specifically require that, before reaching its decisions, the Board shall hold hearings (at which it receives evidence) and file findings of fact and legal conclusions. But the Act[38] does require the Board to "establish rules and regulations

[35] I cannot believe it advisable to reintroduce into our legal system the notion of heresy, i. e., the wilful and persistent opposition to ideas authoritatively defined as truth. Surely we do not want to revert to treating erroneous thinking as a crime, to retrace the steps which led away from the pernicious writ de haeritico comburendi. We should remember that those zealous to condemn men to burning at the stake for heresy acknowledged that heresy "belonged to a man's thoughts and not his deeds," and could therefore be proved only by suspicion; that, consequently, they instituted a regime of systematic inquiry into what went on in men's minds, and graded suspicions into "light" suspicions calling for vigilance, "vehement" suspicions demanding punishment, and "violent" suspicions, requiring punishment by the State.

John Stuart Mill wisely observed: "But it is not the minds of heretics that are deteriorated most by the ban placed on all inquiry which does not end in orthodox conclusions. The greatest harm is to those who are not heretics, and whose mental development is cramped, and their reason cowed, by the fear of heresy. There have been great * * * individual thinkers in a general atmosphere of mental slavery. But there never has been, nor ever will be, in that atmosphere an intellectually active people. * * * He who knows only his own side of the case knows little of that." Liberty, Chapter II.

[36] The use of the phrase "administrative absolutism" (a product of epithetical jurisprudence) has become fashionable with those who maintain that invariably—in the very nature of things—administrative agencies, and especially the federal agencies, tend to deprive citizens of their civil liberties, while, by way of contrast, the courts, because of their inherent nature, zealously protect those fundamental legal rights. Judge Wyzanski recently raised a grave doubt as to the universal validity of that thesis. "It is not an accident," he writes, "that the administrative machinery of the Fair Employment Practices Commission has accomplished more in three years than the courts in seventy-five years under national and local laws against discrimination." 58 Harv. L. Rev. (1945) 285, 288. Of course, Judge Wyzanski would not for a moment deny the right to, or question the wisdom of, judicial review of an administrative agency's conduct; nor would I.

[37] Certain exceptions (with reference to industry orders) are not pertinent here. Gemsco v. Walling, — U. S. — (February 26, 1945).

[38] 45 U. S. C. A. § 228j (b) (4).

to provide for the adjustment of all controversial matters arising in the administration" of the Act, coupling this requirement with one empowering the Board to "require and compel the attendance of witnesses, administer oaths" and "take testimony." Pursuant to these provisions, the Board has established detailed regulations for formal hearings, with an opportunity to be heard, and for decisions coupled with findings (based on the evidence) and conclusions of law. And, as to appellee, just that has been done. In the discharge of its statutory duty in arriving at its decision here, the Board has, unavoidably, interpreted the statute. Such an interpretation, consequently, ranks higher than that of the Wage and Hour Administrator in cases where he holds no hearings.[39]

The Retirement Board's interpretation is, I think, in the same category as the interpretation by the National Labor Relations Board of the meaning of the word "employees" in the National Labor Relations Act. In N. L. R. B. v. Hearst Publications, Inc., 322 U. S. 111, 130–131, the Court held that where that Board, in the course of a specific proceeding necessarily involving that issue, holds that certain persons are "employees," then "the reviewing Court's function is limited,"[40] more limited than when similar "questions of statutory interpretation" arise "in the first instance in judicial proceedings," (although even then, the Supreme Court said the courts must give "appropriate weight" to the interpretation "of those whose duty is to administer the questioned statute"). The Supreme Court said that it was "not necessary" for the courts "to make a completely definitive limitation around the term 'employee.' That task has been assigned primarily to the agency created by Congress to administer the Act * * *. Resolving that question * * * 'belongs to the usual administration' of the Board. Gray v. Powell, 314 U. S. 402, 411. Cf. Labor Board v. Standard Oil Co., 138 F. (2d) 885, 887–888."[41] It is not without significance that the Supreme Court in so deciding reversed the Ninth Circuit[42] which, in its opinion, used substantially the same reasoning for disregarding the administrative interpretation as that contained in Judge Hutcheson's opinion here.

Whether particular persons are "employees" under the National Labor Relations Act is no more and no less "jurisdictional" than whether a particular person is an "employer" within the definition of that term under the Retirement Act; and the N. L. R. A. gives the Labor Board no more and no less express authority to construe "employees" than the Retirement Act gives the Retirement Board to construe "employer," as defined in that Act. Hence I think we

[39] As to the effect of an administrative hearing on an administrative interpretation, see Southern Garment Manufacturers v. Fleming, 122 F. (2d) 622, 633 (App. D. C.).

[41] The Standard Oil opinion was by this court (per L. Hand, J.); it described, in the cited portion, the limited power of courts in reviewing administrative decisions.

[42] 136 F. (2d) 608, 611–612.

should no longer regard as authoritative the dictum in Shields v. Utah R. Co., 305 U. S. 177, 185, that an administrative interpretation when it involves a "jurisdictional" question can have no weight unless the administrative agency is specifically directed by the statute to pass on such a question.[43] Accordingly, I think we should not follow the dictum in Utah Copper Co. v. Railroad Retirement Board, 129 F. (2d) 358, 361 (C. C. A. 10) which rested on the dictum in the Shields case.[44] It is noteworthy, in this connection, that in reaching its conclusion in the Hearst case, the Supreme Court cited Gray v. Powell, 314 U. S. 402, and United States v. American Trucking Associations, 310 U. S. 534; for the Supreme Court thus further showed that the worth of an administrative interpretation is the same whether (as in Gray v. Powell and United States v. American Trucking Associations) the administrative officer is specifically required to determine a "jurisdictional" issue, or (as in the Hearst case) merely required to do so impliedly as an unavoidable incident of the discharge of its statutory duty in hearing and deciding a particular case.

I do not believe (as my colleagues do) that, when the Supreme Court in the Hearst case spoke of a "broad statutory term," it intended to preclude the application of the doctrine it there announced to statutory terms which, while somewhat detailed, are reasonably capable of alternative interpretations. Nor can I agree with the suggestion that we should assume that Supreme Court rulings relative to the Labor Board are not to be applied to other agencies when the Supreme Court's opinions otherwise indicate; we rejected such an argument in Herzfield v. Federal Trade Commission, 140 F. (2d) 207, 209 (C. C. A. 2). And Gray v. Powell, 314 U. S. at 412, answers the suggestion that the doctrine here under discussion becomes inoperative when there is "no dispute as to the evidentiary facts."

For the foregoing reasons, and in line with previous uniform decisions in this Circuit, I agree with the Retirement Board's contention that we must accord considerable weight to its statutory construction, necessarily incident to its decision rendered in this particular case after an administrative hearing.[45] To quote the Attorney General's Committee on Administrative Procedure, the question is not whether the Board gave the statute the "right

[43] Cf. Dickinson, Crowell v. Benson: Judicial Review of Administrative Determination of Questions of "Constitutional Fact," 80 U. of Pa. L. Rev. (1932) 1055, 4 Selected Essays on Constitutional Law, 993, 998–1000, 1002–1004, 1013–1014, 1017–1020; Jacoby, Administrative Law and Railroad Retirement Legislation, 12 U. of Chi. L. Rev. (1944) 26, 48–56.

[44] Ellers v. Railroad Retirement Board, 132 F. (2d) 636, 638–639 (C. C. A. 2) is not in point. There we held that no weight should be given to a regulation of the Board determining a fact affecting not the Board's jurisdiction but that of the district courts.

[45] See, e. g., S. E. C. v. Associated Gas & El. Co., 99 F. (2d) 795, 798 (C. C. A. 2); Morgan Stanley & Co. v. S. E. C., 126 F. (2d) 325, 332 (C. C. A. 2); Associated Industries v. Ickes, 134 F. (2d) 694, 710–711 (C. C. A. 2); Niagara Falls Power Co. v. Fed. Power Commission, 137 F. (2d) 787, 792 (C. C. A. 2).

interpretation," but whether its interpretation has "substantial support." [46] We have heretofore in this court and I think we should now read the Supreme Court's decisions [47] as admonishing us thus: The courts must acquiesce in such an administrative interpretation unless it is plainly erroneous; [48] if the Board's conclusion is rationally permissible, it is irrelevant that, independently, we might otherwise reasonably construe the statute; when two or more alternative interpretations are open, the administrative interpretation if reasonable must be accepted. This doctrine of the Supreme Court has been stated succinctly by the Attorney General's Committee as follows: An administrative body's interpretation "is to be given weight—not merely as the opinion of some men or even of a lower tribunal, but as the opinion of the body especially familiar with the problems dealt with by the statute and burdened with the duty of enforcing it." [49] Cf. Gray v. Powell, 314 U. S. 402, 413; Dickinson, Judicial Review of Administrative Determinations, 25 Minn. L. Rev. (1941) 588, 592, 593; Stern, Review of Findings of Administrators, Judges and Juries, 58 Harv. L. Rev. (1944) 70, 99–109, 122–124; Timberg, Administrative Fact Findings, 27 Wash. U. L. Q. (1941) 62, 169, 4 Pike & Fischer, Administrative Law, 359 at 383.

5. Accordingly, I consider it our restricted function to ascertain whether the language of the Act precludes the Board's conclusion on the ground that it lacks reasonableness. Applying that test, I think we should sustain the Board's decision.

Appellee rests its contention as to the unreasonableness of the Board's conclusion on the following grounds: (1) The language of the "employer" definition in the Retirement Act is virtually the same as that found in the definition of "transportation" in the first section of the Transportation Act. [50] (2) The courts and the Interstate Commerce Commission have so construed "transportation" in the Transportation Act as to include only acts done in discharge of a carrier's obligations imposed upon it by law or contract. (3) Therefore appellee is not an "employer," because it does not perform acts for the Pennsylvania in the discharge of that carrier's obligations thus imposed upon it. I do not agree that such an argument compels the conclusion that the Board unreasonably interpreted the statute.

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[46] Final Report of Attorney General's Committee on Administrative Procedure (1941) 90–91.

[47] See, e. g., United States v. American Trucking Associations, 310 U. S. 534, 549; Gray v. Powell, 314 U. S. 402, 411; N. L. R. B. v. Hearst Publications, 322 U. S. 111, 130–131; Overnight Motor Co. v. Missel, 316 U. S. 572, 580; Billings v. Truesdell, 321 U. S. 542, 552; Colgate v. United States, 320 U. S. 422, 426; Noble v. United States, 319 U. S. 88, 93.

[48] I so read the statement in N. L. R. B. v. Hearst Publications, supra, at 131 that the administrative interpretation must be accepted if "it has a 'warrant in the record' and a reasonable basis in law."

[49] Loc. cit., supra, note 27, p. 91.

[50] 49 U. S. C. A. §1 (3).

(a) In the first place, as the purposes of the two statutes are not identical, this argument would not necessarily be sound even if the two sections were identically worded. United States v. Colorado & N. R. Co., 157 Fed. 321, 330 (C. C. A. 8, cert. den. 209 U. S. 544) construing the Safety Appliance Act; cf. South Chicago Co. v. Bassett, 309 U. S. 251, 259-261.

(b) More important, the two sections are not identical. The Transportation Act, in defining "transportation," includes railroad facilities "and all services in connection with the receipt, delivery * * * storage and handling of property transported." The same language is found in the definition of "employer" in the Retirement Act. But the definition of "transportation" in the Transportation Act does not include the phrase, contained in the Retirement Act, "performs any service in connection with the transportation of * * * property by railroad." And the phrase as to "storage," etc., common to both Acts, is, in the Retirement Act, separated from the other phrase (i. e., "any service in connection with the transportation") by the word "or." The Retirement Act definition is thus disjunctive. It is therefore broader than the definition in the Transportation Act. To hold otherwise would be to read out of the Retirement Act the phrase "any service in connection with the transportation * * *."[11]

It follows, I think, that the Board reasonably concluded that the Retirement Act coverage is not limited to the same subject matter as "transportation" in the Transportation Act. Accordingly, we cannot say that the Board's interpretation of the Retirement Act to include appellee as an "employer" was unreasonable. If that be true, we never reach the question whether the construction for which appellee contends, and which my colleagues accept, is not also an alternative reasonable reading of the statute.

6. My colleagues state that "in litigation over the meaning of the definition [of employer] when used in the Carrier's Taxing Act, the courts have uniformly repudiated the construction now placed by the Board in favor of the one we take," citing, as evidence of this uniformity, Allen v. Ocean S. S. Co. of Savannah, 123 F. (2d) 469 (C. C. A. 5) and Magruder (Walling) v. Baltimore Steam Packet Co., 144 F. (2d) 130 (C. C. A. 4). Those cases, however, did not relate to warehouse companies like appellee but to steamboat companies; and it may be that the legislative history excludes entities of the latter kind from the Act's coverage, a question we need not here consider.

7. The legislative history does not, however, shed too much light on the application of the Act to a warehouse company operating as does appellee.

[11] That such an interpretation is improper, see, e. g., McDonald v. Thompson, 305 U. S. 263, 266; Ex Parte Public Bank, 278 U. S. 101, 104.

Appellee stresses the testimony of witnesses before Congressional committees as showing that the purpose of Congress was not to include such a company within the Act. But it has never been held that such testimony constitutes part of the legislative history bearing on the legislative intention. Associated Industries v. Ickes, 134 F. (2d) 694, 710 (C. C. A. 2).[33] What we said in S. E. C. v. Robert Collier, 76 F. (2d) 939, 941 (C. C. A. 2) is not apposite; there the testimony consisted of recommendations, for amendment of a statute, made by the administrative agency responsible for prosecution of the new functions conferred upon it by the amendment. In the case of an ordinary witness, the fact that he aided in drafting the bill is of little significance, for the reasons expressed by Lord Halsbury in Holden v. Dexter [1902] A. C. 474, 477.

The Board, however, directs attention to this passage in the report of the Senate Committee: "By these changes there are brought within the scope of the Act substantially all those organizations which are intimately related to the transportation of passengers or property in the United States." The Board also cites the statement on the floor of the Senate by Senator Wagner, who was then in charge of the Bill, that "it covers a great number of employees, not only those directly in the railroad business but those associated with it, and in that regard is more liberal than the present Act." While these remarks are legitimate parts of the legislative history and favor the Board's position, nevertheless they are somewhat ambiguous since they may have referred to portions of the initial section of the Act not here pertinent.

8. My colleagues seek to diminish the importance of the Board's statutory interpretation on three grounds:

(a) The Board's decision, say my colleagues, was by "a bare majority." But since there are but three members of the Board, any of its decisions if not unanimous must be by a majority of one. So, too, is the decision of this court in this case; and we have held that a dissent by a member of an administrative agency no more vitiates its decision than does a dissent in the case of a judicial decision.[33]

(b) The Board's proceeding began, say my colleagues, with a mere opinion of its General Counsel, which the Board substantially adopted as its decision. But this procedure is expressly contemplated by the Act[34] which empowers the Board "to delegate to any of its employees the power to make decisions on applications for annuities or death benefits in accordance with rules and regulations prescribed by the Board, Provided, however, That any person aggrieved by a decision so made shall have the right to appeal to the Board." The Board's regulations, pursuant to this statutory

[33] Cf. McCaughn v. Hershey Chocolate Co., 283 U. S. 488, 493–494.
[33] Speary Gyroscope Co. v. N. L. R. B., 129 F. (2d) 922, 924 (C. C. A. 2).
[34] 45 U. S. C. A. § 229j (b) (5).

provision, delegate initial decision-making to its General Counsel and provide for an appeal to the Board. Here appellee thus appealed, and, on that appeal, the Board gave its decision after a full hearing.

(c) The members of the Board, my colleagues say, are "appointed on a partisan basis." Nevertheless both Judge Hutcheson, in South v. Retirement Board, 131 F. (2d) 748, 750 (C. C. A. 5),[35] and this court in Ellers v. Retirement Board, 132 F. (2d) 636, 639-640 (C. C. A. 2), have heretofore dealt with this Board as if its "informed" or "experienced" judgment entitled its decisions to precisely the same judicial respect as that of any other administrative agency.[36]

9. To the argument that the Board's interpretation means the inclusion of many activities outside the "railroad industry" the short answer is that it does not do so unless the company performing the services is owned or controlled by a carrier. If a company both (a) performs such services and (b) is thus owned, it is not necessary that the company be, in effect, a mere incorporated department of the railroad company. I see no cogency in the argument that the Board's decision brings within the Act a warehouse company performing services of the type defined in the Act, if the company is owned or controlled by a railroad company, but not if it is independently owned and controlled. Congress, not the Board, made the differentiation. Nor will it do to "parade the horribles" by pointing to the possibility that the Board may hereafter seek to apply the Act to companies whose services have no intimate relation to a carrier's transportation activities.[37] If such cases should arise, the courts will deal with them.

It should be noted in this connection that, as pointed out in its opinion in this case, the Board has decided that many types of non-carrier companies owned or controlled by railroads are not "employers," e. g., telegraph, water-supply, bus, railroad land, electric power, companies, and many others.

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[35] Judge Hutcheson's opinion in South v. Retirement Board, supra, expressly adopted "as correct" the statement of Judge Underwood in Holloway v. Railroad Retirement Board, 44 F. Supp. 59; there Judge Underwood spoke of the "informed judgment" and the "experienced judgment" of this Board, citing cases relating, inter alia, to the Interstate Commerce Commission, the National Labor Relations Board, and the Federal Communications Commission.

[36] True, South v. Retirement Board, supra, dealt solely with the Board's fact-finding power. But Judge Hutcheson regards that as the only power of any administrative agency which the courts must respect. If, however, he is wrong on that issue, and of statutory interpretations of such agencies do deserve judicial respect because based on "experienced judgment," then I fail to see how he can rationally differentiate such interpretations by this Board merely because of the manner in which, by statute, its members are appointed, since he has held that this Board's judgment is no less "experienced" than that of other agencies.

[37] The Board's Regulation 202.7, an "interpretative" regulation, shows that the Board has no intention thus to attempt an extension of the Act.

10. The Board has as yet made no award in favor of anyone. It has merely said that, in connection with some pending applications for awards by persons and in amounts not disclosed in the record, if hereafter those persons are held to be appellee's employees and otherwise entitled to relief, the Board will hold that appellee is an "employer" and therefore owes them obligations under the Act.

Nevertheless, as I view the Board's powers, appellee is a "person aggrieved" within the judicial review secton of the Act (45 U. S. C. A. § 228k). For, as I believe the courts must give weight to the Board's decision interpreting the Act, I think that appellee was at once affected by the Board's decision here: Unless and until that decision is judicially set aside, appellee must, as an "employer" file reports with the Board or suffer statutory penalties;[58] if the Board's decision is incorrect, appellee, as a result of that decision while unreversed, is unjustifiably threatened with potential financial burdens. Accordingly, appellee, on my view, can maintain this suit.[59]

If, however, my colleagues' view of the Board's powers is correct, then I have difficulty in seeing a basis for this suit. For my colleagues hold that a court can give no more weight to the Board's decision than to a lawyer's opinion, and that a court can decide for itself, wholly without regard to the Board's conclusions, the status of appellee as an "employer." If that be true, then appellee after the Board's decision, as thus far made, was in precisely the same position as it had been before, so that the decision had no effect on appellee, for it was not, in legal effect, a real decision. On that assumption, (1) appellee is not a "person aggrieved," and will not be until the Board renders an award; and (2) the suit should be dismissed as prematurely brought—without any judicial decision on the merits.[60] On my colleagues' view of the Board's power, the Board's decision being a nullity, this suit must be regarded as the equivalent of one brought for a declaratory judgment before any action taken by the Board; and I think that, in the light of the judicial review section of the Act, such a suit cannot be maintained.

[58] See 45 U. S. C. A. § 228m.

[59] Columbia Broadcasting System v. United States, 316 U. S. 407; Federal Communications Commission v. National Broadcasting Company, 319 U. S. 239, Associated Industries v. Ickes, 134 F. (2d) 694 (C. C. A. 2).

[60] Cf. Gilbert v. S. E. C., F. (2d) (C. C. A. 7, December 20, 1944); In re Michigan-Ohio Building Corp., 117 F. (2d) 191 (C. C. A. 7); Okin v. S. E. C., 145 F. (2d) 206 (C. C. A. 2).

In the United States Circuit Court of Appeals for the Second Circuit

No. 138—October Term, 1944

DUQUESNE WAREHOUSE COMPANY, PLAINTIFF-APPELLEE,

vs.

RAILROAD RETIREMENT BOARD, DEFENDANT-APPELLANT,

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES, AND GEORGE M. HARRISON, PRESIDENT OF SAID BROTHERHOOD, INTERVENING DEFENDANTS-APPELLANTS.

On Appeal From the District Court of the United States for the Southern District of New York

Petition for rehearing

Your petitioner, the Railroad Retirement Board, defendant-appellant in the above-entitled cause, respectfully prays that a rehearing of this cause be granted on the following grounds:

1. That, as appears from pages 1162 to 1166 of the opinion of

the Court, the majority of the Court was under a misapprehension of, and incorrectly applied, the principles of law, as they are established by decisions of the United States Supreme Court and by decisions of this Court, concerning the proper scope of the judicial review of administrative determinations, in that the majority failed to accord weight to or consider the reasonableness of the appellant Board's construction of the statutory provision in question.

2. That the majority of the Court did not follow the well-established rule (Dobson v. Commissioner, 320 U. S. 489, Commissioner of Internal Revenue v. Scottish American Investment Co., 323 U. S. 119) that in reviewing a decision of an administrative agency courts are limited to determining whether the administrative agency's inferences and conclusions have any substantial basis in the evidence.

3. That the majority of the Court, in violation of the established law as to the limited scope of judicial review, mistakenly made findings of fact (see footnote 5 on pages 1156 to 1159 of the Court's opinion) independently of, and at variance from, the facts as found by the Board. For instance, the statement that Duquesne "is in no sense a department of Pennsylvania, but is, and always has been, conducted as a separate corporate entity, and entirely separate from and independent of Pennsylvania" (page 1166), and the statement that Duquesne "is engaged solely in the commercial warehouse business" (page 1157), constitute such independent and variant findings by the Court. On the other hand, in making its independent statement of facts, the majority of the Court overlooked significant facts which were found by the Board, such as that Duquesne's warehouses have been valuable links in the chain of Pennsylvania's railroad transportation (R. 21), and that Duquesne's operations are directly, intimately, and integrally related, functionally and economically, to Pennsylvania's railroad transportation (R. 21, 25).

4. That the majority of the Court, as appears from its statement (on page 1160 of the opinion) of the positions of the parties, was under a misapprehension as to the position of defendant-appellant Board, in that it is not, as the Court's opinion stated, the Board's position that Duquesne operates "entirely independently" of Pennsylvania; and the majority of the Court, as appears from the failure to mention certain of the Board's reasons stated in the Board's decision, was under a misapprehension as to the reasons for the Board's conclusion, such as that Duquesne's operations are primarily conducted for the purpose of assisting Pennsylvania in its attempt to increase its railroad traffic, and that a substantial part of these operations consist of storing property while it is in the course of suspended through interstate shipment.

5. That because of the misunderstandings set forth in the foregoing paragraphs, the majority of the Court was led into a mistaken view (see page 1161 of the opinion) of the meaning of the statutory phrase "in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad."

6. That even under the Court's view of the statutory provision, the Court should have reversed the Court below, since when Duquesne loads and unloads, receives and delivers, stores and otherwise handles goods under the Pennsylvania's storage-in-transit privileges, it not merely performs service "in connection with" the receipt, delivery, transfer in transit, storage, and handling of property transported, but it receives, delivers, stores, handles and transfers property which is in the course of transportation. Further, under Duquesne's contracts with Pennsylvania for handling overfreight, and damaged unclaimed freight, and delivery to the owner or Pennsylvania when the true owner is ascertained, Duquesne's services constitute services on property as to which transportation has not been completed. The majority of the Court failed to recognize those facts; as appears from the opinion, if those facts had been recognized, the majority would have reached the opposite conclusion even under its stated view (on page 1161 of the opinion) that the above-entitled statutory language is limited to "acts done only by or for the carrier while its obligations persist."

Defendant-appellant Board prays, for the reasons hereinabove set forth, that the cause be reheard.

Respectfully submitted.

RAILROAD RETIREMENT BOARD,
Petitioner.

By MYLES F. GIBBONS,
DAVID B. SCHREIBER,
LOUIS TURNER,
Counsel for Petitioner.

We hereby certify that the foregoing petition is, in our opinion, well founded in law and should be granted, and is not interposed for delay.

MYLES F. GIBBONS,
DAVID B. SCHREIBER,
LOUIS TURNER,
Counsel for Petitioner.

United States Circuit Court of Appeals for the Second Circuit

DUQUESNE WAREHOUSE COMPANY, PLAINTIFF-APPELLEE

v.

RAILROAD RETIREMENT BOARD, DEFENDANT-APPELLANT

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES, AND GEORGE M. HARRISON, PRESIDENT OF SAID BROTHERHOOD, INTERVENING DEFENDANTS-APPELLANTS

Before CHASE, HUTCHESON, and FRANK, Circuit Judges

Myles F. Gibbons, General Counsel; David B. Schreiber, Assistant General Counsel; Louis Turner, Attorney, Railroad Retirement Board, Petitioner.

PER CURIAM:

Petition for rehearing is denied.

H. B. C.
J. C. H., Jr.,
Circuit Judges.

Filed April 23, 1945.

United States Circuit Court of Appeals for the Second Circuit

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 23rd day of April, one thousand nine hundred and forty-five.

Present: Hon. HARRIE B. CHASE, Hon. JOSEPH C. HUTCHESON, Jr., Hon. JEROME N. FRANK, Circuit Judges.

DUQUESNE WAREHOUSE COMPANY, PLAINTIFF-APPELLEE

v.

RAILROAD RETIREMENT BOARD, DEFENDANT-APPELLANT

BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, ET AL., INTERVENING DEFENDANTS-APPELLANTS

A petition for a rehearing having been filed herein by counsel for the Defendant-Appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

ALEXANDER M. BELL, *Clerk.*

Present: Hon. HARRIE B. CHASE, Hon. JOSEPH C. HUTCHESON, Jr., Hon. JEROME N. FRANK, Circuit Judges.

DUQUESNE WAREHOUSE CO., PLAINTIFF-APPELLEE

v.

RAILROAD RETIREMENT BOARD, DEFENDANT-APPELLANT

BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, ET AL., INTERVENING DEFENDANTS-APPELLANTS

Appeal from the District Court of the United States for the Southern District of New York.

Judgment—April 24, 1945

This cause came on to be heard on the transcript of record from District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

ALEXANDER M. BELL, *Clerk*.

[Clerk's certificate to foregoing transcript omitted in printing.]

IN UNITED STATES DISTRICT COURT

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION

DISSENTING OPINION

Judgment—April 24, 1945

[Clerk's certificate to foregoing transcript omitted in printing.]

Supreme Court of the United States

Order allowing certiorari

Filed June 11, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is consolidated with No. 1338, Duquesne Warehouse Co. vs. Railroad Retirement Board et al. for argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1945

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 103

DUQUESNE WAREHOUSE COMPANY,
PETITIONER,

vs.

RAILROAD RETIREMENT BOARD AND BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED JUNE 1, 1945.

CERTIORARI GRANTED JUNE 11, 1945.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 103

DUQUESNE WAREHOUSE COMPANY,
PETITIONER,

vs.

RAILROAD RETIREMENT BOARD AND BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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[fol. 1]

IN UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA

No. 8894

RAILROAD RETIREMENT BOARD, et al., Appellants,

vs.

DUQUESNE WAREHOUSE COMPANY, Appellee

Appeal from the District Court of the United States for the District of Columbia

Joint Appendix

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Actio No. 21586

DUQUESNE WAREHOUSE COMPANY, 298 Duquesne Way, Pittsburgh, Pennsylvania, Plaintiff,

vs.

RAILROAD RETIREMENT BOARD, 844 Rush Street, Chicago, Illinois, Defendant

PETITION FOR REVIEW—Filed October 12, 1943

Plaintiff complains of the defendant and here files its petition for review, and respectfully alleges as follows:

[fol. 2] *First.* This action arises under the Railroad Unemployment Insurance Act (52 Stat. 1094), more particularly as amended October 10, 1940 (54 Stat. 1094), Sec. 5 (c)(f) thereof. It is brought to review the final decision of the Railroad Retirement Board awarding benefits to claimants upon the basis of pay earned in the service of plaintiff, which denies that it is an employer as defined in the aforesaid Act and did not comply with the provisions thereof. The particular issue under complaint here is the correctness of the final decision of the Railroad Retirement Board that plaintiff is an employer as defined in the aforesaid Act.

Second. Plaintiff is a corporation organized under the laws of the Commonwealth of Pennsylvania on August 1, 1906, and existing by virtue of the same. All of its stock is owned by The Pennsylvania Railroad Company. During the entire period of its existence plaintiff has been engaged solely as a public warehouseman in the business of commercial warehousing at Pittsburgh, Pa., except that for a limited period of time, between August 1937 and 15 May 1938, it conducted a similar business at Erie, Pa., with respect to newsprint paper only.

Third. Defendant is an independent agency in the executive branch of the United States Government, established by the Railroad Retirement Act of 1937, and is obligated and empowered to administer the Railroad Unemployment Insurance Act. Its main office is at No. 844 Rush Street, in the City of Chicago, Illinois.

Fourth. Under date of February 11, 1943, the Railroad Retirement Board, consisting of three members, rendered its decision that plaintiff is an employer within the meaning of the Railroad Retirement Act. That decision was not unanimous, one member dissenting in a separate opinion. Following that decision, and on February 27, 1943, the General Counsel of the Railroad Retirement Board rendered an opinion to the effect that plaintiff is an employer under the Railroad Unemployment Insurance Act. Annexed hereto and made a part hereof and marked Exhibit 1, is a copy of that opinion. On May 12, 1943, he entered an order awarding benefits to claimants on the [fol. 3] basis of pay earned in the service of plaintiff, however, subject to right of recovery as provided in Section 5 (c) of the Railroad Unemployment Insurance Act, because of the fact that plaintiff denies that it is an employer as defined in that act and did not comply with the provisions of the same. A copy of that order is hereto annexed and made a part hereof and marked Exhibit 2. On the same day the General Counsel by order reopened for further proceedings under the regulations governing such matters his determination of February 27, 1943, holding that plaintiff is an employer under the Railroad Unemployment Insurance Act. A copy of that order is hereto annexed and

made a part hereof and marked Exhibit 3. The concluding paragraph of the same is as follows:

> "The record in the proceeding under the Railroad Retirement Act, Jurisdictional Docket No. 18, shall constitute the record in the proceeding under the Railroad Unemployment Insurance Act, and the determination of the Duquesne Warehouse Company's employer status under the Railroad Unemployment Insurance Act shall proceed on the basis of such record unless, on or before May 25, 1943, any properly interested party expresses an intention to submit additional evidence, or to present argument, in accordance with Sections 319.42 and 319.45 of the Regulations."

Fifth. On May 14, 1943, the General Counsel of the Railroad Retirement Board wrote to counsel for plaintiff, a party properly interested in the proceeding, reciting the foregoing facts. A copy of that letter and of Part 319 therein referred to of the Regulations of the Railroad Retirement Board under the Railroad Unemployment Insurance Act are hereto annexed and marked Exhibits 4 and 5, respectively. Under date of May 19, 1943, by letter counsel for plaintiff agreed that the record in the proceedings as to the status of plaintiff under the Railroad Retirement Act, Jurisdictional Docket No. 18, "shall be the record in the proceeding under the Railroad Unemployment Insurance Act." Copy of that letter is hereto annexed and made a part hereof and marked Exhibit 6. Thereupon, in accordance with governing regulations, the matter was [fol. 4] submitted by the General Counsel to the Railroad Retirement Board which rendered its final decision on June 15, 1943, holding by a majority that plaintiff is an employer within the meaning of Sec. 1 (a) of the Railroad Unemployment Insurance Act. The decision was not unanimous, one member dissenting and writing a separate opinion. Copies of this decision and these opinions are hereto annexed and made a part hereof and marked Exhibit 7.

Sixth. This petitioner, a properly interested party and duly notified as aforesaid of its right to participate in the proceeding before the Railroad Retirement Board, being aggrieved by this determination of that Board, here brings

its petition for review of the final decision of the Retirement Board which has determined the employer status of the plaintiff with reference to claims for benefits awarded under the Railroad Unemployment Insurance Act. Before the filing of this petition all administrative remedies open to it under the Railroad Unemployment Insurance Act within the Board were availed of by the plaintiff and exhausted. In view of the fact that the record in the proceeding before the Railroad Retirement Board, Jurisdictional Docket No. 18, relating to the status of this plaintiff under the Railroad Retirement Act of 1937, has by agreement of the parties been made the record in the proceeding under the Railroad Unemployment Insurance Act, reference is now made in the following paragraphs Seventh, Eighth, Ninth, Tenth and Eleventh of this petition to that record.

Seventh. Under date of May 23, 1939, the General Counsel of the Railroad Retirement Board in a letter to Mr. E. W. Smith, President of the plaintiff, issued an opinion that the plaintiff is an "employer" within the meaning of Section 1 (a) of the Railroad Retirement Act. A copy of that letter opinion is attached hereto and made a part hereof and marked Exhibit 8. Subsequently, and on September 15, 1939, at Washington, D. C., counsel for the plaintiff appeared before two members of the Board—the General Counsel of the Board being present also—and protested against that opinion and submitted a statement of facts and memorandum of law which the Board accepted. Copy of that statement of facts (the memorandum [fol. 5] of law being omitted) is hereto annexed and made a part hereof and marked Exhibit 9. At the same time counsel for the plaintiff filed with the Board an executed substitute questionnaire of the Board on Form IQ-2-C, together with a letter of the same date. A copy of that questionnaire is hereto annexed and made a part hereof and marked Exhibit 10. A copy of that letter is hereto annexed and made a part hereof and marked Exhibit 11. For information purposes, a copy of the executed questionnaire which was superseded by Exhibit 10 is hereto attached and marked Exhibit 12.

Eighth. On December 15, 1939, counsel for the plaintiff wrote the Chairman of the Retirement Board requesting a hearing before any finality of determination by the Board

in this proceeding. Copy of that letter is attached and made a part hereof and marked Exhibit 13. Reply was made by the Chairman of the Retirement Board on January 3, 1940, a copy of which is attached hereto and made a part hereof and marked Exhibit 14. The time for submission was extended to February 15, 1940. On February 14, 1940, counsel for plaintiff submitted to the Chairman of the Retirement Board a statement of facts and memorandum of law accompanied by a letter. A copy of that statement of facts (the memorandum of law being omitted) is hereto annexed and made a part hereof and marked Exhibit 15; and a copy of that letter is also hereto annexed and made a part hereof and marked Exhibit 16. That statement of facts, Exhibit 15, was accepted under the conditions stated in that letter, Exhibit 16. On March 12, 1942, counsel for plaintiff wrote to the Chairman of the Retirement Board his letter of March 12, 1942, copy annexed hereto and made a part hereof and marked Exhibit 17, enclosing two affidavits, one of H. A. Bietenduefel, verified March 4, 1942, the other of Wilson B. Little, verified March 2, 1942, both of which are hereto annexed and made parts hereof and marked Exhibits 18 and 19, respectively. These affidavits were accepted by the Board and made a part of the record as per letter of the Secretary of the Board of April 2, 1942, copy of which is hereto annexed and made a part hereof and marked Exhibit 20.

Ninth. On February 3, 1942, the Secretary of the Re-
[fol. 6] tirement Board submitted to counsel for plaintiff a proposed decision of the Board, and assigned the case for oral argument. Copy of that proposed decision is annexed hereto and made a part hereof and marked Exhibit 21. On March 27, 1942, counsel for plaintiff filed with the Board its exceptions to proposed decision. The case was argued before the Board on May 28, 1942, all three members being present. On February 11, 1943, the Board rendered its decision, two members supporting the majority decision. One member dissented in a separate opinion. Copy of the decision and opinions are hereto annexed and made a part hereof and marked Exhibit 22.

Tenth. The exhibits which are annexed to this complaint are true and correct copies of the originals which are a part

of the record in this case. That record shows the following facts:

(1) Plaintiff is a public warehouseman chartered to conduct a storage and warehouse business; is engaged solely in the commercial warehousing business at Pittsburgh, Pa., and has been so engaged since the day of its incorporation on August 1, 1906. It issues warehouse receipts pursuant to the Warehouse Receipts Act of the Commonwealth of Pennsylvania—Act of March 11, 1909, P.L. 19. The business is conducted under the direction of the Superintendent of the plaintiff who has full and unrestricted authority to conduct a commercial warehouse business in accordance with the terms of the charter of the plaintiff. On February 13, 1934, plaintiff was certificated as a member of the Code of Fair Competition for the Merchandise Warehousing Trade pursuant to the National Recovery Act, 48 Stat. 195, and continued as such until the rendering on May 27, 1935 by the United States Supreme Court of its decision in the case of *A. L. A. Schechter Poultry Corp, et al.* v. *United States*, 295 U. S. 495.

Employees of the plaintiff are carried on its payroll and are paid solely out of its funds. They are hired by plaintiff and discharged by it. They are under no continuing or other authority from The Pennsylvania Railroad Company to supervise and direct the manner of rendition of their services, and never have been; nor has any attempt [fol. 7] ever been made to exercise such authority. They are not accorded free transportation by The Pennsylvania Railroad Company; they are not entitled to become members of The Pennsylvania Railroad Voluntary Relief Department, membership in which is limited to employees and former employees of the Railroad Company, or of The Pennsylvania Railroad Employes Provident and Loan Association, membership in which is limited to employees of the Railroad Company. They have never been regarded by The Pennsylvania Railroad Company as its employees, nor by the plaintiff as other than its employees. Plaintiff has paid and is paying taxes under the Federal Social Security Act, Titles 8 and 9, and collects from the wages of its employees the tax imposed by Title 8 of the Federal Social Security Act. It also makes contributions under the State Unemployment Compensation Law, P.L. 1937, p. 2897.

(2) The operations of plaintiff are conducted at Pittsburgh, Pa., and at East Liberty, Pa., the latter being within the city limits of Pittsburgh. In each case these operations are in a warehouse building which is leased from The Pennsylvania Railroad Company. The railroad company retains a portion on the ground floor of each building where an officially designated freight agency of the railroad company is maintained with an agent employed and controlled by it. Each such station is fully equipped with tracks and other facilities for the receipt, delivery and handling of freight inbound and outbound, both carload and less. The operations of each are separate from the operations of the plaintiff. The freight which arrives at the plaintiff's warehouse at East Liberty comes in by rail and moves out in the same way. At its warehouse in Pittsburgh proper about 95% of the business of plaintiff arrives at its warehouse by rail. The balance arrives by truck but not locally. About 60% moves outbound by rail, principally less than carload. The balance moves out by truck. Incoming freight by rail is consigned to the owner care of the plaintiff. Outbound shipments by rail are made by the plaintiff and in its name, plaintiff acting as agent for such owner.

Plaintiff has a private siding at each warehouse where [fol. 8] carlot deliveries are made and shipments accepted by the railroad company. Delivery is made by the car being placed on the siding of the plaintiff. The railroad company has then completed its transportation. The owner unloads. Likewise, in the case of outbound carlot shipments, the railroad company places the car on the siding and the owner loads. The railroad company's obligations begin when the owner has loaded the car and the railroad company has received the property and has issued its covering bill of lading. All such freight, both inbound and outbound, in carloads by rail is carried by the railroad company at carload rates. Loading and unloading by the owner is required by Rule 27, Section 1 of the governing railroad tariff, being Consolidated Freight Classification No. 13, and reading as follows, there being no exceptions as provided in the rule:

> "Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at C. L.

rating or rates, except where the tariff of the carrier at point of origin or destination or stopover station (as the case may be) provides for the loading or unloading of C. L. freight by carrier."

All freight delivered by the railroad company to the plaintiff or received by the railroad company from the plaintiff is carried by the railroad company at tariff rates which are subject to the Consolidated Freight Classification. A. H. Greenly's I. C. C.-O. C. 57, Section 1 of Rule 23 of that classification is this:

"Carriers' agents must not act as agents of shippers or consignees for the assembling or distribution of C. L. or L. C. L. freight."

Section 1 of Rule 14 of the same classification is this:

"Carload ratings or rates apply only when a carload of freight is shipped from one station, in or on one car, except as provided in Rule 24, in one calendar day from midnight to midnight, by one shipper for delivery to one consignee at one destination. Only one bill of lading from one loading point and one freight [fol. 9] bill shall be issued for such C. L. shipment. The minimum C. L. weight provided is the lowest weight on which the C. L. rating or rate will apply." (No exception applies to the freight under consideration here.)

The plaintiff files no tariffs with the Interstate Commerce Commission or any state commission, nor is it a party to any tariff of any railroad company or other common carrier.

(3) In the case of less than carload inbound shipments arriving by rail the freight is unloaded by the railroad company from cars to the platform of its agency, and there delivery is made to the plaintiff by the railroad company and appropriate delivery receipt taken. In the case of less than carload outbound shipments the plaintiff delivers the property to the agent of the railroad company at its station, and the railroad company issues its bill of lading, loads the shipment into the car and moves it out.

(4) The only commodity which is handled by the plaintiff at its East Liberty warehouse is sugar in carlots. While

this freight is in the possession of the warehouse company it is under the exclusive control and direction of the owner. The responsibility of the plaintiff is that of warehouseman. There is no responsibility of the railroad company. All services accorded the property, such as loading, unloading, storing, ventilating, drying, moistening, packaging and assembling are performed by the plaintiff for the owner and at the direction of the owner, and charges for such services are paid to the plaintiff by the owner. While the property is in the custody of the railroad company it is subject to a tariff provision of that company (available not merely to plaintiff but to any carlot receiver and shipper of sugar at Pittsburgh and East Liberty) to the effect that if and when shipped outbound in carload lots it is subject to the through railroad rate from original shipping point to ultimate railroad destination. A governing rule of the railroad tariff is as follows:

> "While the shipments are stored in transit under these rules their custody and possession as between [fol. 10] carrier and consignee or owner, shall be that of the consignee or owner."

(5) The Pennsylvania Railroad Company delivers to the plaintiff at its warehouse in Pittsburgh overfreight, damaged refused freight, and damaged unclaimed freight—all occurring while in the possession of the railroad company. In making such delivery to the plaintiff the railroad company entirely severs its connection with the transportation of the property. At the time of such delivery the plaintiff takes entire possession of the freight, reconditions it and sells it at private sale. In case the freight proves to be worthless, plaintiff disposes of it. For these services plaintiff charges the railroad company 10% of the gross proceeds of sale plus the amount of any necessary expenses incurred in reconditioning and handling, and remits the balance to the railroad company. These services take place altogether after railroad transportation has been terminated. Plaintiff has never made delivery of any of such freight to the consignee or owner for or on behalf of the railroad company. Plaintiff has never disposed of, under the direction of the railroad company, any of such freight which has become so worthless as to be unsalable.

(6) During a limited period—August 1937 to 15 May 1938—plaintiff conducted a public commercial warehouse business at Erie, Pa., where it stored newsprint paper in carloads. The paper was handled in the same way as sugar is handled at East Liberty. It was consigned to the plaintiff at Erie, and delivery by the railroad company was made by placing the cars on private siding. It was shipped outbound to Pittsburgh in like manner after placement of car at private siding and loading. The owner unloaded inbound and loaded outbound. The railroad company had nothing to do with the paper after delivery inbound and before receipt outbound. Plaintiff conducts no warehouse business now at Erie, Pa., and has not conducted such since the 1937-8 period, and does not further intend to transact any warehouse business at that point.

Eleventh. In the valuation of properties of The Pennsylvania Railroad Company by the Interstate Commerce Commission—22 Valuation Reports—the two warehouses [fol. 11] heretofore referred to are not classified as carrier properties.

Twelfth. (1) The finding of the majority of the Board that "Duquesne's operations are, and have been at least since August 28, 1925, directly related, functionally and economically, to the performance by the transportation obligations which Pennsylvania has undertaken as a common carrier by railroad, and to the receipt, delivery, transfer in transit, storage, and handling of property transported by Pennsylvania by railroad" is not in accordance with the facts, is unsupported by any evidence in the record, is contrary to the evidence in the record, and is arbitrary, capricious and contrary to law.

(2) The finding of the majority of the Board that "Duquesne is, and has been at least since August 28, 1935, engaged in the non-casual operation of equipment and facilities and the performance of non-casual service in connection with Pennsylvania's transportation of property by railroad, other than trucking service, and the receipt, delivery, transfer in transit, storage, and handling of property transported by Pennsylvania by railroad" is not in accordance with the facts, is unsupported by any evidence in the record, is contrary to the evidence in the record, and is arbitrary, capricious and contrary to law.

(3) Any other finding of the majority of the Board, either directly or indirectly, to the effect that plaintiff is controlled in its operations or managerial functions by The Pennsylvania Railroad Company; that plaintiff's operations are now and have been at least since August 28, 1935 intimately and integrally related to transportation of The Pennsylvania Railroad Company; that plaintiff is in substance an agency of The Pennsylvania Railroad Company for the purposes of storage, loading and unloading and other handling or disposition of goods transported over the lines of that railroad company; that the two warehouses operated by plaintiff, one at Pittsburgh proper and the other at East Liberty in Pittsburgh, have been valuable links in the chain of that railroad company's transportation; or that the services performed by the plaintiff are in connection with property transported by that railroad company, are not in accordance with the facts, are not sup-
[fol. 12] ported by any evidence in the record, are contrary to the evidence in the record, and are arbitrary, capricious and contrary to law.

(4) The conclusion of the majority of the Board that "Duquesne is an 'employer' within the meaning of Section 1 (a) of the Railroad Unemployment Insurance Act" is not in accordance with the facts, is unsupported by any evidence in the record, is contrary to the evidence in the record, and is arbitrary, capricious and contrary to law.

Thirteenth. The undisputed facts appearing in the record require finding that plaintiff has at no time been engaged in the non-casual operation of equipment and facilities and the performance of non-casual service in connection with the transportation of property by railroad, and the receipt, delivery, transfer in transit, storage, and handling of property transported by railroad; and also required the conclusion that plaintiff is not now and at no time has been an employer within the meaning of Section 1 (a) of the Railroad Unemployment Insurance Act.

Wherefore, plaintiff prays (1) that within such time as may be allowed by law defendant be required to certify and file with this Court a complete transcript of the record in this proceeding; and (2) that this Court enter a decree reversing the decision of the Railroad Retirement Board which holds that plaintiff is an employer under the Rail-

road Unemployment Insurance Act, and also reversing all proceedings taken by the Board or those under its authority which in any way is contrary to the ruling of this Court.

McKenney, Flannery & Craighill, by R. A. Bogley—W., a Member of Said Firm; Office and Post Office Address: Hibbs Building, Washington, D. C.; and George R. Allen, Office and Post Office Address: 1740 Broad Street Station Building, Philadelphia, Pa., Attorneys for Plaintiff.

[fol. 13] EXPLANATORY NOTATION FROM STIPULATION AS TO CONTENTS OF RECORD

[Title omitted]

Exhibits 1-22, inclusive, of the petition have been omitted pursuant to stipulation: all the Exhibits, with the exception of Exhibit No. 5, consist of copies of papers contained in the Transcript of the Record Before the Railroad Retirement Board in the Matter of the Status of Duquesne Warehouse Company Under the Railroad Unemployment Insurance Act—Jurisdictional Docket No. 18-A, which transcript of record is set forth at pages 23 through 373 of this printed transcript; Exhibit No. 5 is a copy of Part 319 of the Railroad Retirement Board's Regulations Under the Railroad Unemployment Insurance Act, of which it is here agreed the Court may take judicial notice.

The text of the respective Exhibits of the petition, Exhibit No. 5 excepted, will be found in this printed transcript, in accordance with the following table of page references:

[fol. 14]

Exhibit No.	Corresponding Pages of Record Before Board	Pages of This Printed Transcript Where Found	Pages of This Joint Appendix Where Found
1	—259	—281	—213
2	—261	—283	—214
3	—262–263	—284–285	—215–216
4	—264–265	—286–287	—217–218
6	—268	—290	—221
7	—273–283, 312–327	—295–305, 312–327	—227–234, 239–251
8	—41–42	—63–64	—44–45
9	—51–53, 56–57	—73–75, 78–79	—52–54, 58–59
10	—45–50	—67–72	—48–51
11	—44	—66	—47
12	—2–40	—24–62	—21
13	—68	—90	—72

14	—69	—91	—73
15	—76–81, 109–113	—98–103, 131–135	—79–86, 117–121
16	—74	—96	—77
17	—117–118	—139–140	—125–126
18	—119–124	—141–146	—127–133
19	—125–149	—147–171	—134–161**
20	—186	—208	—207
21	—150–162	—172–184	—136–171
22	—195–230, 232–247	—217–252, 254–269	—199–206***

* Pages 36–48, 56–62 of the printed transcript have been omitted from this joint appendix pursuant to stipulation of the parties.

** Pages 160–163, 165, 167–171 of the printed transcript have been omitted from this joint appendix pursuant to stipulation of the parties.

*** Pages 227–252, 254–269 of the printed transcript have been omitted from this joint appendix pursuant to stipulation of the parties.

[fol. 15] IN UNITED STATES DISTRICT COURT

ANSWER—Filed October 29, 1943

Comes now the defendant, the Railroad Retirement Board, and for answer to the petition for review respectfully shows to the Court:

1. Defendant admits the allegations in paragraph "First" of the petition.

2. Defendant admits the allegations in paragraph "Third" of the petition.

3. The allegations contained in paragraphs "Second," "Fourth," "Fifth," "Sixth," "Seventh," "Eighth," "Ninth," and "Eleventh" of the petition are made independently of, and without specific reference to, the record which was before the defendant Board when it made its decision of which plaintiff is here complaining, and, therefore, such allegations are irrelevant and immaterial and require no answer for the reason that this proceeding is not a *de novo* proceeding, but merely one for review of the decision of the defendant Board, under Section 5 (f) of the Railroad Unemployment Insurance Act, and in such a proceeding the Court considers only the evidence in the record before the defendant Board, a certified transcript of which is filed herewith and made a part of this Answer. For the information of the Court, however, defendant denies such allegations, except insofar as they are in accord with the findings of fact made by the defendant Board in its decision (R. 272-310).

4. Defendant denies the allegations contained in paragraph "Tenth" of the petition, except insofar as they are in accord with the findings of fact made by the defendant Board in its decision (R. 272-310).

5. The statements contained in paragraph "Twelfth" of the petition are conclusions of law and require no answer, but, nevertheless, defendant denies the same.

6. The allegations contained in paragraph "Thirteenth" [fol. 16] of the petition are conclusions of law and require no answer, but defendant, nevertheless, denies the same. Defendant avers that the defendant Board's findings that plaintiff is now, and has been at least since August 28, 1935, completely owned and controlled, through stock ownership, by The Pennsylvania Railroad Company (herein called Pennsylvania), and engaged in the noncasual operation of equipment and facilities and the performance of noncasual service, other than trucking service, in connection with Pennsylvania's transportation of property by railroad, and the receipt, delivery, transfer in transit, storage, and handling of property transported by Pennsylvania by railroad, and that, therefore, plaintiff is now, and has been at least since August 28, 1935, an "employer" within the meaning of Section 1(a) of the Railroad Unemployment Insurance Act, are reasonable and are supported by substantial evidence appearing in the record before the Board, to wit:

The relevant provisions of Section 1(a) of the Railroad Unemployment Insurance Act are as follows: "The term 'employer' means any carrier [express company, sleeping-car company, or carrier by railroad subject to Part 1 of the Interstate Commerce Act] * * *, and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad * * *." All of plaintiff's stock has always been owned and controlled by Pennsylvania, a corrier by railroad subject to Part I of the Interstate Com-

merce Act, and plaintiff's principal officers have been officers of Pennsylvania (R. 3, 4, 51, 76); and at least since August 28, 1935, plaintiff has been primarily, principally, and predominantly engaged in the receipt, delivery, transfer in transit, storage, and other handling of goods transported over the railroad lines of Pennsylvania (R. 4-6, 51-52, 77-81).

[fol. 17] Plaintiff operates two warehouses, one in Pittsburgh proper and the other at East Liberty, within the city limits of Pittsburgh. Both warehouses are owned by Pennsylvania and operated by plaintiff under lease from Pennsylvania. A portion of the ground floor of each warehouse is retained by Pennsylvania and used and officially designated by it as its "freight agency." Plaintiff's warehouses and Pennsylvania's "freight agencies" are both served by the same railroad tracks of Pennsylvania and *the* equipped with platforms or sidings and other facilities for the receipt, delivery, and handling of inbound and outbound freight of Pennsylvania (R. 51, 76-77).

At the East Liberty warehouse, plaintiff handles and stores only one commodity, carload sugar, all of which comes in and goes out over Pennsylvania's rails (R. 4, 51, 77). The sugar is handled by plaintiff under storage-in-transit privileges covered by railroad tariffs filed by Pennsylvania with the Interstate Commerce Commission (R. 4, 78). Incoming shipments are consigned to the owner care of Duquesne, the route being designated as "Penn RR—For Stge in Transit"; and outgoing shipments are consigned to the owner, the bill of lading having a transit record number and being marked "accorded transit privileges at East Liberty, Pa." (R. 77, 111, 112). Plaintiff unloads the sugar from the Pennsylvania's railroad cars upon their arrival and reloads the sugar into Pennsylvania's railroad cars upon their departure (R. 4, 51, 77, 78). In the case of incoming sugar, delivery is made by Pennsylvania and receipt is taken by plaintiff when Pennsylvania places the railroad cars on plaintiff's siding and plaintiff then unloads. In the case of outgoing shipments, the empty railroad cars are placed by Pennsylvania on plaintiff's siding and loaded by plaintiff, which then receives Pennsylvania's bill of lading (R. 5, 77).

At its Pittsburgh warehouse, plaintiff handles freight which has come in, or is destined for movement, over Penn-

sylvania's rails, or which has both come in and is going out over Pennsylvania's rails. Approximately 95 per cent of the commodites handled at that place, which commodities are diverse in character and are hauled in both carload and [fol. 18] less-than-carload form, come in by rail, and approximately 60 per cent leave by rail (R. 51, 79). The services performed by plaintiff at the Pittsburgh warehouse are similar to those at East Liberty insofar as carload freight is concerned. Plaintiff loads and unloads the railroad cars as they come onto and depart from its platform, stores the railroad-transported goods, and performs other handling services in connection with the receipt and delivery of the railroad-transported goods (R. 5, 52, 77, 79). As to the less-than-carload freight, plaintiff, in addition to storing it, performs the handling involved in delivering it to and receiving it from Pennsylvania's platform. In the case of incoming less-than-carload shipments, the freight is unloaded by Pennsylvania from the cars to its platform and is delivered to and received by plaintiff on such platforms. In the case of outgoing less-than-carload shipments, plaintiff delivers the freight onto Pennsylvania's platform; Pennsylvania then issues its bill of lading, loads the freight into the cars and moves them out (R. 5, 52, 79).

Plaintiff also performed, during the period between August 1937 and May 1938 unloading, storing and reloading services and other transit details at Erie, Pennsylvania, in connection with carload shipments of newspaper print entitled to storage-in-transit privileges under Pennsylvania's tariffs. These services were similar to those performed by plaintiff at East Liberty (R. 4, 81).

Plaintiff, in addition, performs services "in connection with" the transportation of property by railroad in handling, reconditioning, and selling for Pennsylvania over freight, damaged refused freight, and damaged unclaimed freight. Out of the gross proceeds realized by plaintiff from each sale of freight delivered to it for disposal by Pennsylvania, plaintiff deducts a commission of 10 per cent and any amounts paid by it for reconditioning, drayage, freight, and other charges, and turns the balance over to Pennsylvania. When any freight is returned by plaintiff to Pennsylvania upon the latter's order, Duquesne is reimbursed only for the actual expenses incurred by it plus storage charges (R. 5, 29-32, 51, 79-80, 121-124). Under

the original contract between plaintiff and Pennsylvania, entered into on February 1, 1922, if any lot of freight [fol. 19] became so worthless as to be unsalable, plaintiff was required to dispose of it as directed by Pennsylvania (R. 31). Under the new contract of January 2, 1941, plaintiff is given authority to dispose of such goods as it sees fit (R. 122). The original contract also provided that if the owner of any unclaimed freight is ascertained prior to the sale of such freight, plaintiff was to deliver such freight upon instructions from Pennsylvania, to the owner, and was to receive from the owner such charges as plaintiff has paid to Pennsylvania (R. 30). The new contract provides that under such circumstances plaintiff shall ,upon Pennsylvania's request, return such freight to Pennsylvania upon repayment of all charges thereon which plaintiff shall have paid to Pennsylvania (R. 122).

Wherefore, the defendant Board prays that the petition be dismissed and the said decision of the defendant Board be sustained.

Joseph H. Freehill, Attorney for Defendant, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois. 910 17th St., N. W., Washington 25, D. C.

October 26, 1943.

[fol. 20] **Certified Transcript of the Record Before the Railroad Retirement Board, in the Matter of the Status of Duquesne Warehouse Company**

Under the Railroad Unemployment Insurance Act

Jurisdictional Docket No. 18-A

Railroad Retirement Board

October 25, 1943

844 Rush Street, Chicago Illinois

Murray W. Latimer, Chairman.

M. R. Reed, L. M. Eddy

I, Mary B. Linkins, Secretary of the Railroad Retirement Board, hereby certify that the attached three hundred and forty-five pages, numbered, for the purpose of this

certification, 1 through 345, constitute a true transcript of the record before the Board in the Matter of the Status of Duquesne Warehouse Company Under the Railroad Unemployment Insurance Act, Jurisdictional Docket No. 18-A.

The determination of the Board in this proceeding having been based, by consent of the interested parties, upon the record before the Board in the Matter of the Status of Duquesne Warehouse Company Under the Railroad Retirement Act, Jurisdictional Docket No. 18, that record is included in this transcript and consists of pages numbered 1 through 257, inclusive.

(Signed) Mary B. Linkins, Secretary of the Railroad Retirement Board.

[Seal of Railroad Retirement Board.]

[fols. 21-198] (Record of proceedings before Railroad Retirement Board In the Matter of the Status of Duquesne Warehouse Company Under the Railroad Retirement Act omitted in the printing of this record pursuant to stipulation of counsel. These proceedings appear at side folios 58 to 266 of the printed record in case No. 95.)

[fols. 199-205]

This form is to be used only by the secretary of the Board or as otherwise specifically directed by the Board.

Form No. G-21
United States of America
Railroad Retirement Board
Transcript of Board Orders

Transcript No. Special
Page 1 of 1 Page
Date Transcript Released

I certify that the following is a true and correct transcript of Board order numbered 43-93, transcribed from the record of proceedings of February 11, 1943.

Lorine M. Fisher, Acting for the Secretary of the Board.

B.O. 43-93

ORDER

Rendering Decision in the Matter of Duquesne Warehouse Company, Jurisdictional Docket No. 18

The Board hereby renders the decision set forth in the Decision of the Board, in the Matter of Duquesne Warehouse Company, Jurisdictional Docket No. 18, after consideration of the record and arguments therein.

(Decision of Railroad Retirement Board in Docket No. 18, Railroad Retirement Act proceeding, omitted in the printing of this record pursuant to stipulation of counsel. This decision appears at side folios 19 to 25 of the printed record in case No. 95.)

[fol. 206] MEMORANDUM

Chicago, Illinois,
February 19, 1943.

To: The Board, Mary B. Linkins, Secretary.
From: M. R. Reed.
Subject: Duquesne Warehouse Company, Jurisdictional Docket No. 18.

For the record and in support of my vote against and dissent from the majority findings in the matter of Duquesne Warehouse Company, Jurisdictional Docket No. 18, expressed in Board Order 43-93, February 11, 1943, I am filing herewith in writing my dissenting opinion.

M. R. Reed.

Enclosure.

[fol. 207]

Feb. 27, 1943.

Registered Mail

Mr. George R. Allen, Assistant General Counsel, The Pennsylvania Railroad Company, Broad Street Station Building, Philadelphia, Pennsylvania.

In the Matter of Duquesne Warehouse Company, Jurisdictional Docket No. 18

DEAR SIR:

Please be advised that the Board, on February 11, 1943, decided that the Duquesne Warehouse Company is an "employer" under the Railroad Retirement Act and that, therefore, service rendered to the company is creditable toward annuities under that Act. You will be furnished with a copy of the Board's decision as soon as it is released.

Very truly yours, Mary B. Linkins, Secretary of the Board.

Feb. 27, 1943.

Registered Mail

George M. Harrison, Grand President, Brotherhood of Railway and Steamship Clerks, Brotherhood of Railway Clerks Building, Cincinnati, Ohio.

In the Matter of Duquesne Warehouse Company, Jurisdictional Docket No. 18

DEAR SIR:

Please be advised that the Board, on February 11, 1943, decided that the Duquesne Warehouse Company is an "employer" under the Railroad Retirement Act and that, therefore, service rendered to the company is creditable toward annuities under that Act. You will be furnished with a copy of the Board's decision as soon as it is released.

Very truly yours, Mary B. Linkins, Secretary of the Board.

[fol. 208] Mar. 5, 1943.

Registered Mail

George M. Harrison, Grand President, Brotherhood of Railway and Steamship Clerks, Brotherhood of Railway Clerks Building, Cincinnati, Ohio.

In the Matter of Duquesne Warehouse Company, Jurisdictional Docket No. 18

DEAR SIR:

I enclose herewith a copy of the Board's decision in the above entitled proceeding.

Very truly yours, Mary B. Linkins, Secretary of the Board.

Enclosure

Mar. 5, 1943.

Registered Mail

Mr. George R. Allen, Assistant General Counsel The Pennsylvania Railroad Company, Broad Street Station Building, Philadelphia, Pennsylvania.

In the Matter of Duquesne Warehouse Company, Jurisdictional Docket No. 18

DEAR SIR:

I enclose herewith a copy of the Board's decision in the above entitled proceeding.

Very truly yours, Mary B. Linkins, Secretary of the Board.

Enclosure.

[fol. 209]

Mar. 5, 1943.

Hon. Guy T. Helvering, Commissioner of Internal Revenue, Washington, D. C.

In the Matter of Duquesne Warehouse Company, Jurisdictional Docket No. 18

DEAR SIR:

I enclose herewith a copy of the Board's decision in the above-entitled proceeding.

Very truly yours, Mary B. Linkins, Secretary of the Board.

Enclosure.

Mar. 5, 1943.

Mr. Oscar M. Powell, Executive Director, Social Security Board, Washington, D. C.

In the Matter of Duquesne Warehouse Company, Jurisdictional Docket No. 18

DEAR SIR:

I enclose herewith a copy of the Board's decision in the above-entitled proceeding.

Very truly yours, Mary B. Linkins, Secretary of the Board.

Enclosure.

[fol. 210]

Mar. 5, 1943.

Mr. Robert F. Cole, Secretary, National Mediation Board, Washington, D. C.

In the Matter of Duquesne Warehouse Company, Jurisdictional Docket No. 18

DEAR SIR:

I enclose herewith a copy of the Board's decision in the above-entitled proceeding.

Very truly yours, Mary B. Linkins, Secretary of the Board.

Enclosure.

Form G-101 (9-36)

Federal Security Agency, Social Security Board
1712 G Street N. W., Washington, D. C. 14-CP.C

Interdepartment Transfer Slip

Date May 28, 1943.

There is herewith transferred to:

Mr. Ludo C. Pickett, Director, Retirement Claims, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois.

A 200 786 Certified

A copy of letter addressed to Mr. Elisha H. Craig, 1415 Milan Avenue, Brookline, Pittsburgh, Pennsylvania, account number 159-12-4276, disallowing his claim under Title II of the Social Security Act.

[fol. 211] Concerning: It appears from information on file in this office that the wage earner may have been an "employee" as defined in section 1(b) Railroad Retirement Act, 1937,

Which apparently requires your attention.

Writer has been informed of this reference.

(Signature) John J. Corson, Director, (Title) Bureau of Old-Age and Survivors Insurance.

C.H NAN BF.

59-12-4276-A

Field Office: Pittsburgh, Pennsylvania

May 6, 1943.

Area Office, Philadelphia, Pennsylvania.

Mr. Elisha H. Craig, 1415 Milan Avenue, Brookline, Pittsburgh, Pennsylvania.

Dear Mr. Craig:

This letter refers to your claim for benefits under Title II of the Social Security Act. Our records show that you are not now entitled to primary insurance benefits.

The Social Security Act provides that a wage earner must be fully insured in order to qualify for benefits. To be fully insured you must have been paid wages of at least $50.00 in each of six calendar quarters since January 1, 1937. Our records show that you have not been paid wages of $50.00 or more in any calendar quarter. When you have the necessary quarters for an insured status, you may then file your application for benefits.

Pay received from *Duquesne Warehouse Company, Pittsburgh*, Pennsylvania, could not be included because employment with this company is not covered by the Social Security Act.

We have been informed by the Railroad Retirement Board 844 North Rush Street, Chicago, Illinois, that services for the Duquesne Warehouse Company are creditable toward annuities under the Railroad Retirement Act and [fol. 212] that your claim is being adjudicated under that act. A copy of this letter is being sent to that Board.

If you disagree with this determination, you may request the Bureau of Old-Age and Survivors Insurance to reconsider your claim. Additional evidence is not essential to obtain a reconsideration, but if new evidence is available, it should be submitted. If you prefer, you may request a hearing on your claim before a referee of the Social Security Board. A request for a reconsideration or a hearing should be made promptly, and must be filed within six months of this date.

If you have any questions as to your claim or if you wish to request a reconsideration or a hearing, call at or write to the field office at the address given above.

Very truly yours, James F. Tully, Chief, Area Office.

cc—Railroad Retirement Board.
jsk:yr.
207.

Note: Application received by the Social Security Board at Pittsburgh, Pennsylvania, on March 2, 1942.

February 27, 1943.

Mr. E. W. Smith, President, Duquesne Warehouse Company, 908 Pennsylvania Station, Pittsburgh, Pennsylvania.

DEAR MR. SMITH.:

This has reference to your letter of March 29, 1941 and previous letters regarding the coverage of your company under the Railroad Retirement Act.

Since the Board has upheld the decision of General Counsel that the Duquesne Warehouse Company is an "employer" under the Act from August 1906 to date, it is desirable that the prior service reports be submitted at as early a date as possible.

We shall appreciate advice from you as to the probable [fol. 213] rate of submission and the approximate date upon which you expect to complete the program.

Form PS-7 is enclosed in order that you may designate the official to whom checks in payment for the verification of service may be sent.

If we can be of service to you in the completion of the prior service records program, do not hesitate to call upon us.

You-s very truly, W. A. Rooksbery, Chief Liaison Officer.

Enclosure.
WAR:JH:mc.

Feb. 27 1943.

The Director of Employment and Claims

The General Counsel, Duquesne Warehouse Company.

As you know, a General Counsel's opinion was issued some time ago ruling that the Duquesne Warehouse Company is an "employer" under the Railroad Retirement Act. The company, however, protested the ruling and submitted to the Board additional evidence and argument in support of the protest. On the basis of the record in the case and upon consideration of the applicable principles of law, the Board decided, on February 11, 1943, that Duquesne is an "employer" under the Railroad Retirement Act. Since the "employer" definition in the Railroad Unemployment Insurance Act is identical to that in the Railroad Retirement Act, it is my opinion, on the basis of the record in the proceeding under the Railroad Retirement Act, that Duquesne Warehouse Company is likewise an "employer" under the Railroad Unemployment Insurance Act.

Joseph H. Freehill, General Counsel.

[fol. 214] Duquesne Warehouse Company

Office of the President

Pennsylvania Station,

Pittsburgh, Pa.

March 8, 1943.

Mr. W. A. Rooksbery, Chief Liaison Officer, Railroad Retirement Board, 844 Rush Street, Chicago, Ill.

Re: Duquesne Warehouse Company

Dear Sir:

In response to yours of the 27th ult. with enclosures, let me say that you appreciate that there is a dissenting opinion in this case. And I am advised by counsel that the majority rule of the Board is contrary to law. Accordingly the matter will be litigated to the end that there may be a judicial determination of the controverted question of coverage.

Very truly yours, E. W. Smith, President.

Railroad Retirement Board

Office of the General Counsel

Order Awarding Benefits on the Basis of Compensation Earned in the Service of Duquesne Warehouse Company

Pursuant to the authority vested in the General Counsel by Section 319.40 of the Regulations under the Railroad Unemployment Insurance Act and in accordance with the determination in the General Counsel's opinion of February 27, 1943, L-43-167, that the Duquesne Warehouse Company is an "employer" under the Railroad Unemployment Insurance Act, benefits are hereby awarded to all individuals whose compensation, earned in the service of the Duquesne Warehouse Company exclusively or in addition to compensation earned in the service of other covered employers, is $150 or more in the applicable base year, such benefits to be [fol. 215] determined in accordance with Section 2(a) of the Railroad Unemployment Insurance Act by including compensation earned in the service of the Duquesne Warehouse Company, and to be payable for any days of unemployment established in accordance with the Railroad Unemployment Insurance Act and applicable regulations: *Provided, how-*

ever, that all benefits paid pursuant to this award shall be paid subject to a right of recovery thereof as provided in Section 5(c) of the Railroad Unemployment Insurance Act.

Order entered and award of benefits made this 12th day of May 1943.

Joseph H. Freehill, General Counsel.

Railroad Retirement Board

Office of the General Counsel

ORDER REOPENING GENERAL COUNSEL'S INITIAL DETERMINATION ON STATUS OF DUQUESNE WAREHOUSE COMPANY UNDER RAILROAD UNEMPLOYMENT INSURANCE ACT

Whereas, following the Board's decision of February 11, 1943, that the Duquesne Warehouse Company is an employer under the Railroad Retirement Act, *In the Matter of Duquesne Warehouse Company*, Jurisdictional Docket No. 18, the General Counsel, on February 27, 1943, L-43-167, issued an opinion, on the basis of the record in the proceeding under the Railroad Retirement Act, that the Duquesne Warehouse Company is likewise an employer under the Railroad Unemployment Insurance Act; and

Whereas, on March 8, 1943, the Duquesne Warehouse Company notified the Board that it is questioning the correctness of the decision of the Board that it is an employer under the Railroad Retirement Act, thereby also questioning the correctness of the determination of the General Counsel that it is an employer under the Railroad Unemployment Insurance Act, since the two Acts have identical employer definitions; and

Whereas, in accordance with Section 319.40 of Part 319 of the Regulations governing proceedings under Section [fol. 216] 5(c) of the Railroad Unemployment Insurance Act, the General Counsel, on May 12, 1943, entered a general order awarding benefits on the basis of a compensation earned in the service of the Duquesne Warehouse Company, subject to a right of recovery of any benefits paid pursuant to such order, as provided in Section 5(c) of the Railroad Unemployment Insurance Act:

Now, Therefore, the General Counsel, pursuant to the authority vested in him by Part 319 of the Regulations, orders and directs that:

(1) The General Counsel's determination of February 27, 1943, that the Duquesne Warehouse Company is an em-

ployer under the Railroad Unemployment Insurance Act be, and it hereby is, reopened for further consideration and proceeding in accordance with Part 319 of the Regulations; and that

(2) The record in the proceeding under the Railroad Retirement Act, Jurisdictional Docket No. 18, shall constitute the record in the proceeding under the Railroad Unemployment Insurance Act, and the determination of the Duquesne Warehouse Company's employer status under the Railroad Unemployment Insurance Act shall proceed on the basis of such record unless, on or before May 25, 1943, any properly interested party expresses an intention to submit additional evidence, or to present argument, in accordance with Sections 319.42 and 319.45 of the Regulations.

Joseph H. Freehill, General Counsel.

May 12, 1943.

[fol. 217] May 14, 1943.

Registered Mail

Mr. George R. Allen, Assistant General Counsel, The Pennsylvania Railroad Company, Broad Street Station Building, Philadelphia, Pennsylvania.

DEAR SIR:

Following the Board's decision that the Duquesne Warehouse Company is an "employer" under the Railroad Retirement Act, *In the Matter of Duquesne Warehouse Company*, Jurisdictional Docket No. 18, I have, on February 27, 1943, issued an opinion with respect to the employer status of the Duquesne Warehouse Company under the Railroad Unemployment Insurance Act. Since the "employer" definition in the Railroad Unemployment Insurance Act is the same as that in the Railroad Retirement Act, I ruled, on the basis of the record in the proceeding under the Railroad Retirement Act, that the Duquesne Warehouse Company is likewise an "employer" under the Railroad Unemployment Insurance Act. On March 8, 1943, Mr. E. W. Smith, the president of the Duquesne Warehouse Company, advised the Board's Chief Liaison Officer, Mr. W. A. Rooksbery, that the Duquesne Warehouse Company is contesting the correctness of the decision of the Board that the Duquesne Warehouse Company

is an "employer" under the Railroad Retirement Act. Since the two Acts have the same "employer" definition, it is assumed that the Duquesne Warehouse Company is also questioning the correctness of my determination of February 27, 1943, that it is an "employer" under the Railroad Unemployment Insurance Act.

In accordance with Section 319.40 of Part 319 of the Regulations governing proceedings under Section 5(c) of the Railroad Unemployment Insurance Act, I have, on May 12, 1943, entered a general order awarding benefits on the basis of compensation earned in the service of the Duquesne Warehouse Company, subject to a right of recovery of any benefits paid pursuant to such order, as provided [fol. 218] in Section 5(c) of the Railroad Unemployment Insurance Act. On the same day, and pursuant to Section 319.42 of the Regulations, I also issued an order reopening my determination of February 27, 1943, that the Duquesne Warehouse Company is an "employer" under the Railroad Unemployment Insurance Act, for further consideration and proceedings in accordance with Part 319 of the Regulations.

Sections 319.42 and 319.45 of the Regulations provide that after the reopening of an initial determination by the General Counsel, all parties properly interested "shall be afforded full opportunity to present further evidence upon any controversial question of fact, orally or in writing or by means of exhibits; to examine and cross-examine witnesses, and to present argument;" and that at the request of any such party, "the General Counsel shall provide a hearing, and may provide a hearing on his own motion." However, since the issue as to the "employer" status of the Duquesne Warehouse Company under the Railroad Unemployment Insurance Act is exactly the same as the issue as to its "employer" status under the Railroad Retirement Act, the parties will presumably have no objection to the adoption of the record in the proceedings under the Railroad Retirement Act as the record in the proceedings under Part 319 of the Regulations under the Railroad Unemployment Insurance Act. Consequently, as provided in the order reopening my determination of February 27, 1943, the determination of the Duquesne Warehouse Company's "employer" status under the Railroad Unemployment Insurance Act will proceed on the basis of the record before the Board in Jurisdictional Docket No. 18,

the proceeding under the Railroad Retirement Act, unless on or before May 25, 1943, any properly interested party expresses an intention to submit additional evidence or to present argument in accordance with Sections 319.42 and 319.45 of the Regulations.

Under Section 319.57 of the Regulations, the General Counsel may render a further decision which is appealable to the Board, or he may, if in his judgment final disposition of the matter will be expedited thereby, directly submit the matter to the Board. In this case final disposition [fol. 219] will clearly be expedited by direct submission to the Board and this is what I propose to do, unless developments in the proceeding should indicate that final disposition would be facilitated by a further decision of mine.

There are enclosed herewith copies of (1) Part 319 of the Regulations; (2) the General Counsel's opinion of February 27, 1943; (3) the order of award of benefits; and (4) the order reopening the General Counsel's determination of February 27, 1943.

Very truly yours, Joseph H. Freehill, General Counsel.

May 14, 1943.

Registered Mail

Mr. George M. Harrison, Grand President, Brotherhood of Railway and Steamship Clerks, Brotherhood of Railway Clerks Building, Cincinnati, Ohio.

Dear Sir:

Following the Board's decision that the Duquesne Warehouse Company is an "employer" under the Railroad Retirement Act, *In the Matter of Duquesne Warehouse Company,* Jurisdictional Docket No. 18, I have, on February 27, 1943, issued an opinion with respect to the employer status of the Duquesne Warehouse Company under the Railroad Unemployment Insurance Act. Since the "employer" definition in the Railroad Unemployment Insurance Act is the same as that in the Railroad Retirement Act, I ruled, on the basis of the record in the proceeding under the Railroad Retirement Act, that the Duquesne Warehouse Company is likewise an "employer" under the Railroad Unemployment Insurance Act. On March 8, 1943, Mr. E. W. Smith, the president of the Duquesne Warehouse Company, advised the Board's Chief Liaison Officer,

Mr. W. A. Rooksbery, that the Duquesne Warehouse Company is contesting the correctness of the decision of the Board that the Duquesne Warehouse Company is an "em-
[fol. 220] ployer" under the Railroad Retirement Act. Since the two Acts have the same "employer" definition, it is assumed that the Duquesne Warehouse Company is also questioning the correctness of my determination of February 27, 1943, that it is an "employer" under the Railroad Unemployment Insurance Act.

In accordance with Section 319.40 of Part 319 of the Regulations governing proceedings under Section 5(c) of the Railroad Unemployment Insurance Act, I have, on May 12, 1943, entered a general order awarding benefits on the basis of compensation earned in the service of the Duquesne Warehouse Company, subject to a right of recovery of any benefits paid pursuant to such order, as provided in Section 5(c) of the Railroad Unemployment Insurance Act. On the same day, and pursuant to Section 319.42 of the Regulations, I also issued an order reopening my determination of February 27, 1943, that the Duquesne Warehouse Company is an "employer" under the Railroad Unemployment Insurance Act, for further consideration and proceedings in accordance with Part 319 of the Regulations.

Sections 319.42 and 319.45 of the Regulations provide that after the reopening of an initial determination by the General Counsel, all parties properly interested "shall be afforded full opportunity to present further evidence upon any controversial question of fact, orally or in writing or by means of exhibits; to examine and cross-examine witnesses, and to present argument;" and that at the request of any such party, "the General Counsel shall provide a hearing, and may provide a hearing on his own motion." However, since the issue as to the "employer" status of the Duquesne Warehouse Company under the Railroad Unemployment Insurance Act is exactly the same as the issue as to its "employer" status under the Railroad Retirement Act, the parties will presumably have no objection to the adoption of the record in the proceedings under the Railroad Retirement Act as the record in the proceedings under Part 319 of the Regulations under the Railroad Unemployment Insurance Act. Consequently, as provided in the order reopening my determination of February 27, 1943,

the determination of the Duquesne Warehouse Company's [fol. 221] "employer" status under the Railroad Unemployment Insurance Act will proceed on the basis of the record before the Board in Jurisdictional Docket No. 18, the proceeding under the Railroad Retirement Act, unless on or before May 25, 1943, any properly interested party expresses an intention to submit additional evidence or to present argument in accordance with Sections 319.42 and 319.45 of the Regulations.

Under Section 319.57 of the Regulations, the General Counsel may render a further decision which is appealable to the Board, or he may, if in his judgment final disposition of the matter will be expedited thereby, directly submit the matter to the Board. In this case final disposition will clearly be expedited by direct submission to the Board and this is what I propose to do, unless developments in the proceeding should indicate that final disposition would be facilitated by a further decision of mine.

There are enclosed herewith copies of (1) Part 319 of the Regulations; (2) the General Counsel's opinion of February 27, 1943; (3) the order of award of benefits; and (4) the order reopening the General Counsel's determination of February 27, 1943.

Very truly yours, Joseph H. Freehill, General Counsel.

Duquesne Warehouse Company

Office of the President, Pennsylvania Station, Pittsburgh, Pa.

May 19, 1943.

Joseph H. Freehill, Esq., General Counsel, Railroad Retirement Board, 844 Rush Street, Chicago, Ill.

DEAR SIR:

This acknowledges receipt of your letter of the 14th inst. with enclosures with respect to the status of the Duquesne [fol. 222] Warehouse Company under the Railroad Unemployment Insurance Act. In accordance with your proposal, and as more particularly stated in paragraph numbered (2) of your order of reopening General Counsel's initial determination on status of Duquesne Warehouse Company under Railroad Unemployment Insurance Act

dated May 12, 1943, I here agree that the record in the proceeding as to the status of Duquesne Warehouse Company under the Railroad Retirement Act, Jurisdictional Docket No. 18, shall be the record in the proceeding under the Railroad Unemployment Insurance Act. Under this agreement I am assuming it will not be necessary in the protection of the interest of the Warehouse Company for me to take any action in the way of request for hearing on or before the 25th inst., the limit date appearing in your order above referred to.

Your letter indicates your intention of submitting the matter direct to the Board pursuant to Section 319.57 of the Regulations. I am assuming that that is what will be done. Under those conditions, I take it that Section 319.65 of the Regulations will have no application, but that further procedure is governed by Sections 319.70 and 319.75. Your advice is requested as to whether my understanding in this respect is correct.

Very truly yours, George R. Allen, Counsel, 1740 Broad St. Station Bldg., Philadelphia, Penna.

gra-h.

May 22, 1943.

Mr. George R. Allen, Assistant General Counsel, The Pennsylvania Railroad Company, Broad Street Station Building, Philadelphia, Pennsylvania.

DEAR SIR:

This will acknowledge your letters of April 15, 1943, and [fol. 223] May 19, 1943, with respect to the Western Warehousing Company and the Duquesne Warehouse Company.

Your understanding as to the procedure under Part 319 of the Regulations with respect to the status of the Duquesne Warehouse Company under the Railroad Unemployment Insurance Act is correct. Your request for an opportunity to present to the Board the complete facts in the Western Warehousing case will, of course, be granted and you will be advised as to the procedure to be followed in presenting such facts.

Very truly yours, Joseph H. Freehill, General Counsel.

MEMORANDUM

May 27, 1943

To the Board from the General Counsel

Subject Duquesne Warehouse Company—Jurisdictional Docket No. 18-A

Following the Board's decision of February 11, 1943, that the Duquesne Warehouse Company is an "employer" under the Railroad Retirement Act, *In the Matter of Duquesne Warehouse Company*, Jurisdictional Docket No. 18, I have, on February 27, 1943, issued an opinion with respect to Duquesne's employer status under the Railroad Unemployment Insurance Act. Since the "employer" definition in the Railroad Unemployment Insurance Act is the same as that in the Railroad Retirement Act, I ruled, on the basis of the record in the proceeding under the Railroad Retirement Act, that Duquesne is likewise an "employer" under the Railroad Unemployment Insurance Act. On March 8, 1943, Mr. E. W. Smith, the president of Duquesne, advised the Board's Chief Liaison Officer that Duquesne is contesting the correctness of the Board's decision that it is an "employer" under the Railroad Retirement Act. Since the two Acts have the same "employer" definition, it was assumed that Duquesne is also questioning the correctness of my determination of February 27, [fol. 224] 1943, that it is an "employer" under the Railroad Unemployment Insurance Act.

In accordance with Section 319.40 of Part 319 of the Regulations governing proceedings under Section 5(c) of the Railroad Unemployment Insurance Act, I have, on May 12, 1943, entered a general order awarding benefits on the basis of compensation earned in the service of Duquesne, subject to a right of recovery of any benefits paid pursuant to such order, as provided in Section 5(c) of the Act. On the same day, and pursuant to Section 319.42 of the Regulations, I also issued an order reopening my determination of February 27, 1943, that Duquesne is an "employer" under the Railroad Unemployment Insurance Act, for further consideration and proceedings in accordance with part 319 of the Regulations.

Sections 319.42 and 319.45 of the Regulations provide that after the reopening of an initial determination by the

General Counsel, all parties properly interested "shall be afforded full opportunity to present further evidence upon any controversial question of fact, orally or in writing or by means of exhibits; to examine and cross-examine witnesses, and to present arguments;" and that at the request of any such party, "the General Counsel shall provide a hearing, and may provide a hearing on his own motion." However, since the issue as to the "employer" status of Duquesne under the Railroad Unemployment Insurance Act is exactly the same as the issue as to its "employer" status under the Railroad Retirement Act, it was thought that the parties would have no objection to the adoption of the record in the proceedings under the Railroad Retirement Act as the record in the proceedings under Part 319 of the Regulations under the Railroad Unemployment Insurance Act. Consequently, it was provided in the order reopening my determination of February 27, 1943, that the determination of Duquesne's status under the Railroad Unemployment Insurance Act would proceed on the basis of the record before the Board in Jurisdictional Docket No. 18, the proceeding under the Railroad Retirement Act, unless on or before May 25, 1943, any properly interested party expressed an intention to submit additional evidence [fol. 225] or to present argument in accordance with Sections 319.42 and 319.45 of the Regulations.

On May 14, 1943, I advised Duquesne and the Brotherhood of Railway Clerks of the proceeding under Part 319 of the Regulations and sent them copies of (1) Part 319 of the Regulations; (2) the General Counsel's opinion of February 27, 1943; (3) the order of award of benefits; and (4) the order reopening the General Counsel's determination of February 27, 1943. In addition, I caused the order reopening the General Counsel's determination of February 27, 1943, to be published in the Federal Register (8 F. R. 6571). No interested party has expressed an intention to submit additional evidence or to present argument in accordance with Sections 319.42 and 319.45 of the Regulations; and in a letter dated May 19, 1943, Mr. George R. Allen, Counsel for Duquesne, agreed that "the record in the proceeding as to the status of Duquesne Warehouse Company under the Railroad Retirement Act, Jurisdictional Docket No. 18, shall be the record in the proceeding under the Railroad Unemployment Insurance Act."

Consequently, the determination of Duquesne's "employer" status under the Railroad Unemployment Insurance Act is to be based on the record before the Board in the proceeding under the Railroad Retirement Act, Jurisdictional Docket No. 18.

Under Section 319.57 of the Regulations, the General Counsel may render a further decision which is appealable to the Board, or he may, if in his judgment final disposition of the matter will be expedited thereby, directly submit the matter to the Board. As I have stated in my letters of May 14, 1943, to Duquesne and to the Brotherhood of Railway Clerks, final disposition of this case will clearly be expedited by direct submission to the Board. Consequently, I herewith submit the matter to the Board for final decision upon the record in the proceeding under the Railroad Retirement Act, Jurisdictional Docket No. 18. As provided in Section 5(c) of the Railroad Unemployment Insurance Act, the Board's decision will be final and conclusive for all purposes and will conclusively establish all rights and obligations arising under the Act, subject only to judicial [fol. 226] review in the manner provided in Section 5(f) of the Act.

Joseph H. Freehill, General Counsel.

This form is to be used only by the secretary of the Board or as otherwise specifically directed by the Board.

Form No. G-21
United States of America
Railroad Retirement Board
Transcript of Board Orders

Transcript No. Special
Page 1 of 1 Page
Date Transcript Released

I certify that the following is a true and correct transcript of Board order numbered 43-429, transcribed from the record of proceedings of June 15, 1943.

Mary B. Linkins, Secretary of the Board.

B. O. 43-429 ORDER

Rendering Decision in the Matter of Duquesne Warehouse Company, Jurisdictional Docket No. 18-A

The Board, upon consideration of the record and arguments in the matter of Duquesne Warehouse Company, Jurisdictional Docket No. 18, the proceeding under the Railroad Retirement Act, hereby renders the decision set forth in the Decision of the Board in the Matter of the

Status of Duquesne Warehouse Company under the Railroad Unemployment Insurance Act, Jurisdictional Docket No. 18-A.

[fol. 227] Railroad Retirement Board

Jurisdictional Docket No. 18-A

In the Matter of the Status of Duquesne Warehouse Company Under the Railroad Unemployment Insurance Act

DECISION OF THE BOARD—June 15, 1943

Statement of the Case

On the basis of evidence and argument submitted by the Duquesne Warehouse Company, herein called Duquesne, in Jurisdictional Docket No. 18, *In the Matter of Duquesne Warehouse Company*, the Board, on January 29, 1942, issued a proposed decision that Duquesne is an "employer" under the Railroad Retirement Act. On March 28, 1942, Duquesne filed exceptions to the Board's proposed decision and a brief in support of such exceptions. Pursuant to Duquesne's request, a hearing was held before the Board on May 27, 1942, for the purpose of oral argument upon the issues raised in the proceeding. In addition to Duquesne, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, herein called the Brotherhood of Railway Clerks, was represented and participated at such hearing. The position of the Brotherhood of Railway Clerks, representing Duquesne's employees, was that Duquesne is an "employer" under the Railroad Retirement Act. On February 11, 1943, the Board rendered a decision that Duquesne is an "employer" within the meaning of the Railroad Retirement Act as a company directly owned and controlled by a "carrier employer" under that Act and engaged in the non-casual operation of equipment and facilities and the performance of non-casual services in connection with the transportation of property by railroad.

On February 27, 1943, the General Counsel, under duly delegated authority, issued an opinion with respect to Duquesne's "employer" status under the Railroad Unem-[fol. 228] ployment Insurance Act. Since the "employer"

definition in the Railroad Unemployment Insurance Act is the same as that in the Railroad Retirement Act, he ruled, on the basis of the record in the proceeding under the Railroad Retirement Act, that Duquesne is likewise an "employer" under the Railroad Unemployment Insurance Act. Thereafter, Duquesne advised the Board that it was contesting the correctness of the Board's decision that it is an "employer" under the Railroad Retirement Act. Since the two Acts have the same "employer" definition, Duquesne's position with respect to its status under the Railroad Retirement Act also raised a controversy regarding the correctness of the General Counsel's determination of February 27, 1943, that Duquesne is an "employer" under the Railroad Unemployment Insurance Act. Consequently, in accordance with Section 319.40 of Part 319 of the Regulations governing proceedings under Section 5(c) of the Railroad Unemployment Insurance Act, the General Counsel, on May 12, 1943, entered a general order awarding benefits on the basis of compensation earned in the service of Duquesne, subject to the right of recovery of any benefits paid pursuant to such order, as provided in Section 5(c) of the Act. On the same day, and pursuant to Section 319.42 of the Regulations, the General Counsel also issued an order reopening his determination of February 27, 1943, for further consideration and proceedings in accordance with Part 319 of the Regulations. Since the issue as to the "employer" status of Duquesne under the Railroad Unemployment Insurance Act is exactly the same as the issue as to its "employer" status under the Railroad Retirement Act, the order reopening the General Counsel's determination of February 27, 1943, provided that the determination of Duquesne's status under the Railroad Unemployment Insurance Act would proceed on the basis of the record before the Board in the proceeding under the Railroad Retirement Act, Jurisdictional Docket No. 18, unless on or before May 25, 1943, any properly interested party expressed an intention to submit additional evidence or to present argument pursuant to Sections 319.42 and 319.45 of the Regulations.

In accordance with Section 319.42 of the Regulations, all [fol. 229] properly interested parties were duly notified of the reopening of the General Counsel's determination of

February 27, 1943, for further consideration and proceeding under Part 319 of the Regulations. Duquesne and the Brotherhood of Railway Clerks were furnished copies of (1) Part 319 of the Regulations, (2) the General Counsel's opinion of February 27, 1943; (3) the order of award of benefits; and (4) the order reopening the General Counsel's determination of February 27, 1943. No interested party has expressed any intention to submit additional evidence or argument in accordance with Sections 319.42 and 319.45 of the Regulations; and in a letter dated May 19, 1943, Mr. George R. Allen, Counsel for Duquesne, agreed that "the record in the proceeding as to the status of Duquesne Warehouse Company under the Railroad Retirement Act, Jurisdictional Docket No. 18, shall be the record in the proceeding under the Railroad Unemployment Insurance Act."

Pursuant to Section 319.57 of the Regulations, the General Counsel may render a decision upon the record which is appealable to the Board or he may, if in his judgment final disposition of the matter will be expedited thereby, directly submit the matter to the Board. Pursuant to this Section, the General Counsel has submitted this matter directly to the Board for final decision on the basis of the record in the proceeding under the Railroad Retirement Act, Jurisdictional Docket No. 18.

Findings of Fact and Conclusions

After careful consideration of the record in the proceeding under the Railroad Retirement Act, Jurisdictional Docket No. 18, the exceptions and brief filed therein by Duquesne, and the arguments of Duquesne and the Brotherhood of Railway Clerks submitted therein, the Board makes the following findings of fact and conclusions:

Findings of Fact

1. Duquesne was incorporated on August 1, 1906, under the laws of the State of Pennsylvania. Since Duquesne's incorporation, it has been directly and completely owned and controlled, through stock ownership, by the Pennsylvania Railroad Company, herein called Pennsylvania, a [fol. 230] carrier by railroad subject to Part I of the Interstate Commerce Act.

2. Duquesne's principal officers are also officers of Pennsylvania. As of February 17, 1939, such common officers were as follows:

Duquesne Office	Pennsylvania Office
E. W. Smith, President and Director	Vice President
W. S. Franklin, Director	Vice President
J. Taney Willcox, Secretary	Secretary
J. Gordon Watson, Assistant Secretary	Assistant Secretary
Geo. H. Papst, Jr., Treasurer	Assistant Vice President and Treasurer
H. W. Schotter, Assistant Treasurer	Assistant Treasurer
John Pemberton, Jr., Assistant Treasurer	Assistant Treasurer
F. J. Fell, Jr., Comptroller	Vice President and Comptroller
Elmer Hart, Assistant Comptroller	Deputy Comptroller
A. R. Meredith, Real Estate Agent	Real Estate Agent

3. Duquesne's operations are now and have been at least since August 28, 1935, intimately and integrally related to Pennsylvania's railroad transportation. Duquesne has been primarily, principally and predominantly engaged in the storage, loading and unloading, and other handling of goods transported over the lines of Pennsylvania, being in substance an agency of Pennsylvania for such purposes.

4. The two warehouses operated by Duquesne—one in Pittsburgh proper and the other at East Liberty in Pittsburgh—have been valuable links in the chain of Pennsylvania's railroad transportation. They are owned by Pennsylvania and are operated by Duquesne under lease from Pennsylvania. A portion of the ground floor of each warehouse is retained by Pennsylvania and used and officially designated by it as its "freight agency." Duquesne's warehouses, as well as Pennsylvania's "freight agencies", are served by Pennsylvania's railroad tracks and are equipped with platforms and sidings and other facilities for the receipt, delivery, and other handling of inbound and outbound freight.

5. At the East Liberty warehouse, Duquesne handles and stores only one commodity, carload sugar, which comes in and goes out over Pennsylvania's rails. The sugar is handled by Duquesne under storage-in-transit privileges [fol. 231] permitted and covered by railroad tariffs filed by Pennsylvania with the Interstate Commerce Commission. Part of the sugar which passes through Duquesne's warehouse is refined in California and part in New York. That refined in California is moved by ship to one of the eastern ports, such as Philadelphia or Baltimore, and thence by rail

to Pittsburgh; and that refined in New York is shipped by rail directly from New York to Pittsburgh. At Duquesne's warehouse, which is used as a distribution center, the packages of sugar are assembled in the proper number and sizes and then shipped out over Pennsylvania's lines for distribution. Incoming shipments are consigned to the owner care of Duquesne, the route being designated as "Penn R R—For Stge in Transit"; and outgoing shipments are consigned to the owner, the bill of lading having a transit record number and being marked "accorded transit privileges at East Liberty, Pa." Both the unloading of the sugar from, and its reloading into, Pennsylvania cars are performed by Duquesne at the latter's siding for the account of the shipper in accordance with the governing rail tariff (Consolidated Freight Classification No. 13) requiring owners to load and unload freight carried at carload rates. In the case of incoming sugar, delivery is made by Pennsylvania and receipt is taken by Duquesne when Pennsylvania places the cars on Duquesne's siding, and Duquesne then unloads. In the case of outgoing shipments, the empty cars are placed by Pennsylvania on Duquesne's siding and loaded by Duquesne, which then receives Pennsylvania's bill of lading. The handling and storage charges are billed by Duquesne directly against the owners of the property and are paid by such owners.

6. At its Pittsburgh warehouse, Duquesne is principally engaged in the handling of freight which has come in, or is destined for movement, over Pennsylvania's rails, or which has both come in and is going out over Pennsylvania's rails. Approximately 95 per cent of the commodities handled at that place, which commodities are diverse in character and are hauled in both carload and less-than-carload form, come in by rail, the remainder coming in by truck. The respective [fol. 232] rail and truck percentages of the outgoing commodities are 60 and 40. The services performed by Duquesne at the Pittsburgh warehouse are similar to those at East Liberty insofar as carload freight is concerned, except that no sugar is handled. As to the less-than-carload freight, Duquesne, in addition to storing it, performs the handling involved in delivering it to and receiving it from Pennsylvania's platform. The loading and unloading of

less-than-carload freight is performed by Pennsylvania at its platform. In the case of incoming less-than-carload shipments, the freight is unloaded by Pennsylvania from the cars to its platform and is delivered to and received by Duquesne on such platform. In the case of outgoing less-than-carload shipments, Duquesne delivers the freight onto Pennsylvania's platform; Pennsylvania then issues its bill of lading, loads the freight into the cars, and moves them out.

7. Duquesne also performed, during the period between August 1937 and May 1938 unloading, storing, and reloading services and other transit details at Erie, Pennsylvania, in connection with carload shipments of newspaper print entitled to storage-in-transit privileges under Pennsylvania's tariffs. These services were similar to those performed by Duquesne at East Liberty.

8. Duquesne's position as an agency of Pennsylvania, available to provide such facilities and services as the latter requires, appears further from Duquesne's handling, reconditioning, and selling for Pennsylvania, over freight damaged refused freight, and damaged unclaimed freight under a contract originally entered into between the two companies on February 1, 1922, and superseded by a contract dated January 2, 1941. Pennsylvania transports to Pittsburgh any freight it desires to be disposed of by Duquesne and Duquesne removes such freight to its warehouse after the payment to Pennsylvania of all freight and other charges that may have accrued thereon. Out of the gross proceeds realized by it from each sale, Duquesne deducts a commission of 10 per cent and any amounts paid by it for reconditioning, drayage, freight, and other charges, and turns the balance over to Pennsylvania. In the event that the gross proceeds of the sale of freight do not equal the expenses incurred by Duquesne, plus the 10 per cent com- [fol. 233] mission, Duquesne is credited with the difference. When any freight is returned by Duquesne to Pennsylvania upon the latter's order, Duquesne is reimbursed only for the actual expenses incurred by it plus storage charges. Under the original contract, if any lot of freight became so worthless as to be unsalable, Duquesne was required to dispose of it as directed by Pennsylvania. Under the new con-

tract, Duquesne is given authority to dispose of such goods as it sees fit. The original contract also provided that if the owner of any unclaimed freight is ascertained prior to the sale of such freight, Duquesne was to deliver such freight, upon instructions from Pennsylvania, to the owner, and was to receive from the owner such charges as Duquesne has paid to Pennsylvania. The new contract provides that under such circumstances Duquesne shall, upon Pennsylvania's request, return such freight to Pennsylvania upon repayment of all charges thereon which Duquesne shall have paid to Pennsylvania.

9. Duquesne's revenues for the years 1936 through 1938 show the substantial extent to which it has been engaged in functions and activities connected with Pennsylvania's railroad transportation:

	Storage and handling of freight under storage-in-transit privileges	Storage and handling of other freight (including freight coming in or going out, or both, over Pennsylvania's rails)	Sale of damaged merchandise	Subleasing of space to manufacturing concerns
1936	$59,370.40	$63,011.60	$8,599.00	$32,732.00
1937	30,239.93	91,545.99	11,409.00	24,967.00
1938	29,836.01	73,702.99	8,881.86	16,035.17
	$119,646.34	$228,260.58	$28,889.86	$73,734.17

10. In addition to the above revenue figures, the substantial extent to which Duquesne has been engaged in the handling of freight accorded storage-in-transit privileges may be stated in terms of space used. Of the total space used by Duquesne at its warehouses at East Liberty and Pittsburgh, approximately 30 per cent was devoted to the handling of freight accorded storage-in-transit privileges in 1936; approximately 12.5 per cent in 1937; and approximately 12.5 per cent in 1938. During the period of opera- [fol. 234] tion at Erie, all the space at that point was used for such freight.

11. All of Duquesne's operations are intermingled. Duquesne's employes are not assigned exclusively to any one operation but are frequently shifted from one class of work to another. The extent to which personnel was required, however, for the various operations for the years 1936 through 1938, estimated on the basis of the approxi-

mate number of men required on a full-time basis to perform the work in such operations, is as follows:

	Storage and handling of freight under storage-in-transit privileges	Storage and handling of other freight (including freight coming in or going out, or both, over Pennsylvania's rails)	Sale of damaged merchandise	Subleasing of space to tenants
1936	28	30	3	4
1937	14	42	3	4
1938	14	42	3	4

12. Duquesne's employees are affiliated with one of the railway labor organizations, the Brotherhood of Railway Clerks, and their working conditions are governed by a contract between the Brotherhood and Duquesne.

13. Duquesne's operations are, and have been at least since August 28, 1935, directly related, functionally and economically, to the performance of the transportation obligations which Pennsylvania has undertaken as a common carrier by railroad, and to the receipt, delivery, transfer in transit, storage, and handling of property transported by Pennsylvania by railroad.

14. Duquesne is, and has been at least since August 28, 1935, engaged in the non-casual operation of equipment and facilities and the performance of non-casual service in connection with Pennsylvania's transportation of property by railroad, other than trucking service, and the receipt, delivery, transfer in transit, storage, and handling of property transported by Pennsylvania by railroad.

Conclusions

Applying the established principles of law to the facts in this case, it is concluded that Duquesne is an "employer" within the meaning of Section 1(a) of the Railroad Unemployment Insurance Act, and that compensated service rendered to Duquesne is creditable for purposes of that Act.

[fols. 235-254]

Opinion

Since the definition of "employer" in the Railroad Unemployment Insurance Act is the same as that in the Railroad Retirement Act, the Opinion contained in the Decision of the Board in Jurisdictional Docket No. 18, the proceeding under the Railroad Retirement Act, is equally applicable

to the present proceeding and is hereby adopted as the opinion in the present proceeding. On the basis of the facts as here found, and for the reasons contained in such Opinion, it is held that Duquesne is an "employer" within the meaning of the Railroad Unemployment Insurance Act.

(Text of Board's Opinion, as appearing in Decision of the Board in Jurisdictional Docket No. 18)

* * * * * * * *

(Majority opinion of Railroad Retirement Board in Docket No. 18, Railroad Retirement Act proceeding, omitted in the printing of this record pursuant to stipulation of counsel. This opinion appears at side folios 26 to 44 of the printed record in case No. 95)

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[fol. 255] MEMORANDUM

Chicago, Illinois,
June 19, 1943.

To The Board, Marry B. Linkins, Secretary.
From M. R. Reed.

Subject: Duquesne Warehouse Company

Jurisdictional Docket No. 18-A

For the record and in support of my vote against and dissent from the majority findings in the matter of Duquesne Warehouse Company, Jurisdictional Docket No. 18-A, expressed in Board Order 43-429, June 15, 1943, I am filing herewith in writing my dissenting opinion.

M. R. Reed.

Enclosure.

[fol. 256] Railroad Retirement Board

Jurisdictional Docket No. 18-A

In the Matter of DUQUESNE WAREHOUSE COMPANY

M. R. Reed, Member, Dissenting

This proceeding relates to the status of Duquesne Warehouse Company under the Railroad Unemployment Insurance Act, 52 Stat. 1094, 45 U. S. Code, Sec. 351. In juris-

dictional Docket No. 18 the majority of the Board found on February 11, 1943 this respondent to be an employer under the Railroad Retirement Act, 49 Stat. 967, 45 U. S. Code, Sec. 215. From that decision I dissented in a separate opinion. For the reasons set forth in that opinion, I dissent from the decision of the majority in this proceeding. In addition, the following reasons are given for my dissent here.

The record in the Retirement Act proceeding has by agreement been made the record in this case. Findings of fact and conclusions of law made and reached in that proceeding likewise apply to this proceeding under the Railroad Unemployment Insurance Act, and are by this reference incorporated in this dissent as if set forth in extenso. As there, the question here is one of coverage. The language of the Railroad Unemployment Insurance Act is identical with the language of the Railroad Retirement Act in so far as this controversy is concerned. But a study of the history of the Unemployment Insurance Act shows, if anything, more clearly than does such a study of the history of the Railroad Retirement Act, that the Unemployment Insurance Act was not intended to apply to other than railroad companies and railroad workers—to those who are engaged in the railroad industry.

The statute is new. Judicial interpretation has not had time to grow large. Particularly in such cases when application becomes the subject of controversy, one of the most accepted ways of getting at the meaning is to examine the reported hearings before the committees of Congress [fol. 257] while the statute was in bill form.[1] In this in-

[1] *United States of America* v. *Bethlehem Steel Corporation*, 315 U. S. 289, 304, 62 S. C. R. 581, 589; *Federal Security Adm'r* v. *Quaker Oats Co.*, 63 S. C. R. 589, 596; *Holy Trinity Church* v. *United States*, 143 U. S. 457, 464; *Penn Mutual Life Insurance Co.* v. *Lederer*, 252 U. S. 523, 534; *United States* v. *Missouri-Pacific Railroad Co.*, 278 U. S. 269, 279; *United States* v. *Madigan*, 300 U. S. 500, 505; *Cole* v. *Illinois Central Railroad Co.*, 255 Fed. 190, 194; *Smith* v. *Gilliam*, 282 Fed. 628, 636; *Securities & Exchange Commission* v. *Robert Collier & Co.*, 76 Fed. (2d) 939, 940; *Petition of Bone*, 19 Fed. Supp. 219, 222.

stance the same bill was before both the House and the Senate committee. That before the House was H. R. 10127. The hearings were before a subcommittee of the Committee on Interstate and Foreign Commerce, 75th Congress, Third Session, May 26, 27, 31, June 1, 2 and 3, 1938. That before the Senate was S-3772. Hearings were before the Committee on Interstate Commerce, 75th Congress, Third Session, June 3, 6, 7, 8 and 9, 1938. Hereafter these hearings will be referred to as House Hearings and Senate Hearings.

The bill was not drawn by draftsmen of the Congress. It was drafted by railway labor interests.[2] Hence, the language there employed may be accepted as representing the intent of the proponents of the bill. What that language means may best be gathered from the testimony of the witnesses favorable to the bill who testified before these two committees.

First—Coverage. This was intended to be the same as the coverage under the Railroad Retirement Act of 1937.

[2] "About 2 years ago the Railway Labor Executives' Association began to work on this type of protection against the increasing hazard of unemployment, and discussed the problem with the Association of American Railroads. We had a bill drafted along the general lines of State unemployment compensation laws. It was probably a good bill, but we couldn't understand it. It was too complex. Under it, as under the present State laws, no worker would ever really understand his rights. So we appointed a subcommittee of the Railroad Labor Executives' Association to study the subject primarily with a view to simplification. We had several different bills drafted one after another. They were studied by our subcommittee and the chiefs of the railway labor organizations, until finally we arrived at the present bill, which we believe to be the simplest and soundest bill for unemployment insurance ever introduced into any legislature in this country."

(Cashen, President, Switchmen's Union. House Hearings, pp. 21-2. Same statement, same witness, Senate Hearings, p. 18.)

What that coverage was understood to be is to be gathered from these statements:

[fol. 258] "1. *Coverage.*—Identical with that of Railroad Retirement Act of 1937, viz, interstate railroads, certain of their operating subsidiaries, sleeping-car and express companies, traffic and similar associations maintained by the railroads, and railroad labor organizations."

(Cashen, President, Switchmen's Union. House, Hearings, p. 16. Same statement Senate Hearings, p. 22.)

"In the first place we provide that the coverage of this act shall be identical with the coverage of the Railroad Retirement Act; that is to say, it applies, speaking briefly and in summary, only to men who in some capacity or other are engaged in the operation of the country's railroad system. In the second place, it applies in the contribution or taxing side to identically the same base tax as is carried in the carriers' taxing act."

(Hay, counsel for Railway Labor Executives' Association, House Hearings, pp. 29-30.)

"All railroad employees will be covered by the plan. The employees who are now excluded by the operation of two State laws (Alabama and Wisconsin) will be covered. There will be no problem of possible duplication or avoidance of coverage which occurs under the State laws. Employees will be relieved of the problem of trying to ascertain in which States they may possess rights to unemployment benefits. Their rights to benefit based on railroad employment will be created irrespective of the States in which they work or to which they may transfer in the course of their employment."

(Bacus, Research Director, Brotherhood Railway and Steamship Clerks, House Hearings, p. 98.)

Second—Federal Unemployment Legislation For Railroad Workers. The intent of the framers of the act was to single out and remove railroad employees from any coverage under the State unemployment insurance acts and to make a Federal statutory classification of such employees. In support of such a segregation, the history of legislation as to railroad workers was invoked and specific reference

[fol. 259] was made to such acts as Interstate Commerce Act, Railway Labor Act, and Federal Employer's Liability Act.

"Since the enactment of the Interstate Commerce Act in 1887, numerous laws have been enacted applicable only to the railroad industry, recognizing that industry as a distinct national entity:

"I mention but a few of them which will occur to you: The Adamson law; the Hours of Service Act; the Safety Appliance Acts; the Transportation Act of 1920; the Emergency Transportation Act; the Retirement Act, which I mentioned; and the Railway Labor Act.

"These acts, I say, recognize the distinct individual National entity of the railroad industry.

"Not only have acts been passed applicable only to that industry, but acts designed to cover industry generally, as for instance, the N. R. A., and the National Labor Relations Act, and the Social Security Act, with respect to old-age benefits, have exempted the railroad industry.

"The attempt, therefore, to cover the railroad industry into the unemployment compensation systems of the various States runs counter to the logic of railroad legislation history for over a half a century.

"It is, if not unprecedented, certainly violative of the whole course of history since the date I mentioned."

(Hay, House Hearings, pp. 25-26.) See also Brown, House Hearings, p. 123; Rep. Martin, House Hearings, p. 225; House Report, 75th Congress, 3rd Session, No. 2668, p. 1; and Senate Report, 75th Congress, 3rd Session, No. 2164, pp. 1-2.

One of the chief reasons for wanting to place railroad workers in a Federal legislative class by themselves was the claim that the work of many of these employees so often takes them across the boundaries of different states, and hence it was claimed these men had difficulty in getting benefits under the state acts.

"A satisfactory system of unemployment insurance for railroad workers must be Federal. All our agreements are negotiated without reference to State lines. [fol. 260] Most of our members have seniority rights

under these agrements. These seniority rights take no account of State lines. Telegraphers, for example, may have rights over a whole system which runs through many States. Seniority rights may be confined to a single division, but these often cross State lines—Washington to Philadelphia, Philadelphia to Jersey City, Jersey City to New York, for example, on the Pennsylvania Railroad. If our agreements about wages and working conditions take no account of State lines, why should State lines suddenly intrude to affect our rights to unemployment insurance?"

(Cashen, Senate Hearings, p. 19.)

No one has ever contended that a warehouse company engaged in commercial storage or its employees come within the terms of the Railroad Labor Act, or the Federal Employers' Liability Act, or the Interstate Commerce Act. The effort to place them under the Retirement Act and the Railroad Unemployment Insurance Act is new, and certainly is at variance with the administration of those other acts over a long period of years but which acts were used as a pattern for the enactment of the Railroad Unemployment Insurance Act.

Third—Railroad Industry. The entire testimony throughout the hearings, both House and Senate, shows that the act was intended to apply to the railroad industry only—that, is to railroad workers.

road industry only—that is, to railroad workers.

"To state the purpose of the bill in a sentence, it is this: It is to do for the railroad industry with respect to unemployment compensation what the Railroad Retir-ment Act does for that industry with respect to old-age benefits; that is to say, to set up a separate system applicable only to the railroad industry.

"The Chairman. That is, you want to take it out of the general law?

"Mr. Hay. We want to lift it out of the general social security system and apply this system to the railroad industry alone."

(Hay, Senate Hearings, p. 25.)

[fol. 261] "I have taken this much time to explain what we are up against here and why we are coming

here at this time to press this measure. We are pressing it at this time most urgently because we feel that the longer that this thing goes the more difficult it is going to be to unscramble the situation and to get set up, in fairness to the States and to the Federal Government and to the employees, a system that is applicable only to the railroad industry."

(Hay, Senate Hearings, p. 31.)

"Mr. Chairman: How could you say that the Government would pay back to the railroads the extra cost? I think that would be a very difficult thing to do.

"Mr. Latimer. I do not think you could figure the exact cost. Nevertheless, it does seem to me that there are certain functions for which a reasonable estimate of cost could be made and which would be so arranged that no substantial extra cost would be involved on those who perform them. I say that on the assumption that the labor organizations who are sponsoring this legislation are not doing so with the intention of adding to anyone's cost. It would seem to me that the easiest way of handling the administration of a piece of legislation of this sort is to integrate it as far as possible into the existing machinery in the industry.

"I would not say that for any other industry, for the fact that there exists in most local departments and divisions of the railroad industry a committee of adjustment of labor organizations who stand ready to protect the rights of their members makes it safe to adopt the procedure in the railroad industry, whereas it might be unsafe to adopt it in a great many others. I believe that the possibilities of action in that manner are very great.

(Latimer, Senate Hearings, p. 141.)

"That, I think, has applicability to schemes of this sort, because the experience in the railroad industry is that once employment falls off it remains rather stable. After 1932 and in 1933, 1934, 1935, and 1936, years in which there was a tremendous amount of unemployment in the country as a whole, employment in the rail- [fol. 262] road industry was relatively steady. If you look at the employment curves in the industry, there was not much fluctuation."

(Latimer, Senate Hearings, p. 144.)

"The Chairman. I do not think there is any dispute about that. There is a question in my mind with reference not to the part-time employee, but the casual employee—

"Mr. Hay (interposing). I am coming to them.

"The Chairman. The argument that you make with reference to that now would not apply to many of the casual employees.

"Mr. Hay. It would apply, Senator, to those who, under the provisions of this bill, are really entitled to benefits, for this reason: Judge Fletcher made the point that they would, of course, want to contribute to the support of men who have worked for the industry for a sufficient length of time to be branded or classified as railroad men. There is no dispute about that. The difference between us here seems to be over the question of the point at which men should be called railroad men."

(Hay, Senate Hearings, p. 191.)

"The Chairman. They will give him 2 months' employment, so as to cut that down, or else there will be some fear that there would be too many men employed, which would break down that plan, and the bona fide railroad employee might suffer by reason of the funds breaking down because it was overloaded because of these men who are not essentially railroad men.

"This bill is intended to assist the man who is essentially a railroad employee, and I mean the man who makes that his life business, because after a man has worked at railroading for a certain number of years it is difficult for him to get employment in some other line of work. The thing I want to try to do is to protect the employees, and at the same time I do not think that the railroads should be called upon to contribute for a man who is only a casual employee, whose main business is something else. One industry should not be loaded down.

[fol. 263] "Mr. Hay. Well, we are in sympathy with those views, Senator.

"I may say that in the discussions leading up to the final drafting of this bill we concerned ourselves with various ways of reaching this problem. We had in mind the thing that you pointed out, namely, the dan-

ger of working the men just short of sufficient to enable them to qualify.

"We originally had in the bill the provision that the earnings of $150, or whatever amount might be prescribed, should be over a period of a certain number of months, but we discarded that finally because of the very consideration that you have mentioned, namely, that they would work them just short of the time that would be requisite for them to qualify. We put this figure of $150 to be earned during the course of a calendar year in the bill so as to avoid that very thing.

"I realize, Mr. Chairman, that if this merit-rating principle that they have insisted on so much were injected in this bill the very thing that you have mention would undoubtedly happen to a very regrettable extent. Why? In order to eliminate them from employment—to freeze employment down to the lowest possible point, so as to have the most stable employment that they possibly could. That is one of the reasons why we are opposed to the merit rating, which I want to discuss a little later.

"The Chairman. I can understand the merit-rating principle. I think that the man who conducts his business in a high-class manner ought to have advantages over the man who runs his business in a slipshod manner. That would tend to be beneficial, I think. However, in the railroad industry I think you have got to look at it as one rather than separate industries."

(Hays, Senate Hearings, p. 192.)

"Our association has had two principal objectives in this matter. We want a plan of unemployment insurance that any railroad worker can understand. We want a plan of unemployment insurance that is practical for railroad workers, that fits their needs and the conditions of their employment. I have already said [fol. 264] that the passage of this bill will mean a landmark in the history of social-security legislation in the United States, because we know that all our members will clearly understand their rights under it. I want now to emphasize our second purpose."

(Cashen, House Hearings, p. 23.)

"Railroad unemployment is a by-product of the operation of the railroad industry and the industry is responsible to society to alleviate the undesirable

condition which apparently is inseparable from the operation of the industry. The merit-rating principle places this responsibility upon the individual employer, when it should be placed upon the entire industry. Any effective system of insurance spreads the risk over as large a field as feasibly possible. It is our thought that the States will find if necessary, in due course, to abandon the merit rating plans. We feel that the departure from the merit rating principle in this bill constitutes marked progress in the development of a sounder system of unemployment insurance in this country."

(Bacus, House Hearings, p. 80.)

"We charge that the State systems do not reach the unemployment problem on the railroad industry at all. In our industry that problem affects chiefly the lower-paid and short-service workers. We have relatively little unemployment among the long-service workers. The State systems are almost farcical in their application to the workers of our industry who most need the protection of an adequate system of unemployment insurance."

(Hay, House Hearings, p. 256.)

The lines of demarcation as to industry and its extent in this country have been closely defined. In these later times this has been because of the labor situation. For instance, there is a steel industry and a copper industry, and like industries in other metals, such as lead and zinc. Each is separate and distinct. Also there is a clothing industry. And separate and apart from that, there is a cleaning industry. While there are many workers engaged in the cleaning industry who perform work on clothing, yet no [fol. 265] one would contend that the cleaning industry is the clothing industry or a part of it. Similarly, there is a fishing industry and a canning industry. And yet no one would contend that the canning of salmon is a part of the fishing industry. Further, there is a railroad industry for those employed in the railroad transportation. And there is a warehouse industry for the commercial storage and handling of goods.[3] Further, there is a shipping industry

[3] Investigation discloses that the storage and moving of household effects is still another branch.

for transportation by water, and yet no one would assert that the shipbuilding industry is a part of that shipping industry. This line of cleavage is clearly set forth in the case of *Allen* v. *Ocean S. S. Co. of Savannah*, 123 F. 2d 469,[4] where the United States Circuit Court of Appeals for the Fifth Circuit had this question of coverage before it. That case arose under the Carriers Taxing Act of 1937, where the coverage definition here concerned is the same. The General Counsel of this Board had rendered an elaborate opinion with respect to the services of the Steamship Company under the Railroad Retirement and Unemployment Insurance Acts, and held, as the majority holds here, with respect to the services of this warehouse company.[5]

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[4] Certiorari was not asked.

[5] "In my opinion, it is established from all of the foregoing materials that Osco is and has been principally engaged in the performance of services in connection with the transportation of passengers and property by railroad, and the receipt, delivery, transfer in transit, and handling of property transported by railroad, within the meaning of Section 1 (a) of the Railroad Retirement and Railroad Unemployment Insurance Acts and Sections 202.07 and 202.08 of the Regulations. It is clear that in transporting traffic composed of freight and passengers interchanged with Central and other railroads and thus constituting an integral part of their rail-water routes, Osco is engaged in the performance of a service which is reasonably directly related both functionally and economically to the performance by such railroads of their obligations as common carriers by railroad and which, therefore, constitute a service in connection with the transportation of passengers and property by railroads. (Citing cases.)

"It is also clear that the terminal activities conducted by Osco in the handling of railroad interchanged freight, consisting of the delivery and receipt of such freight, the discharging and unloading of such freight from ships, the loading, unloading, dunnaging and bracing of railroad cars for the shipment of such freight, and the lighterage of inbound and outbound railroad interchanged traffic, constitute the operation of equipment and facilities and the performance of

The Circuit Court of Appeals, however, swept that argument aside and said this:

"It is quite apparent that the construction appellant contends for will result in cutting across industrial lines and in absorbing into the special railroad insurance system, some parts of other industries because those parts happen to be owned by railroads, while that [fol. 266] for which appellee contends, will have no such effect. That consideration alone should, we think, give us pause in construing, indeed should prevent our construing the act as appellant does, unless its language does not reasonably admit of any other result.

"Certainly the Congressional intent to include water carriers cannot be drawn from the fact, if it be a fact, which appellant makes so much of, that water carriers, in addition to performing purely steamship services, perform for a charge and for themselves, transportation service which the railroad carriers could have undertaken but left to the water carriers to perform. For, if this were the simple criterion, Congress could easily and would have said so, instead, as it did, of confining the application of the act to rail carriers and companies owned by them which performed a part of their transportation service for them. Appellant realizing this difficulty, in the way of his construction, devotes a good part of his brief to arguing that the services performed by appellee are performed not for itself but as agent for railroad carriers. But on the record this will not at all do. Not a word of it in the slightest tends to support this view. All of it leads directly to the contrary conclusion." p. 471.

Fourth—Contributions. The taxing feature of the statute is covered in the form of contributions—Sec. 8. The rate is 3 per cent of so much of the compensation not in excess of $300 in any calendar month payable by the em-

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services in connection with the receipt, delivery, transfer in transit and handling of property transported by railroad within the meaning of the Acts and the Regulations. Indeed, such services have repeatedly been recognized as railroad transportation services. (Citing cases.)" p. 21.

ployer to the employee. This rate was reached altogether on the basis of payrolls of the railroads. Payrolls of warehouses were not considered. Mr. Latimer, Chairman of [fol. 267] the Retirement Board, testifying with respect to payrolls of certain particular railroads, said this:

"The total earnings of those 100 employees, according to the average data we have compiled, would be in a calendar year about $115,000. Since 40 cases of unemployment can be expected for each 100 individuals employed at some time or other during the year, the $2,717.60 should be divided by $115,000, giving 2.36 per cent of the pay roll as the net cost of benefits for total employment beginning in any calendar year. By this method, it is not necessary to consider unemployment beginning in the previous calendar month and extending into the current year. The benefits to be paid would, therefore, be 2.36 per cent of the pay roll, and that pay roll, I should add, is based on compensation not to exceed $300 in any one month. The Coordinator's estimate made, substantially, an allowance of one-tenth of 1 per cent for the cost of compensating partial unemployment. Since this bill provides benefits only with respect to days of total unemployment, and then only with respect to those days of unemployment in excess of 7 during any period of 15 consecutive days, no such allowance is necessary in the present estimate. Nevertheless, an allowance of 0.30 per cent of payroll was added to provide a margin of safety for contingencies. Also, we have made some allowances for any possible omissions in the Coordinator's figures, without being able to lay our fingers on them: these figures having been compiled to estimate costs for a plan which provided benefits for partial unemployment. Adding the 2.36 per cent and 0.30 per cent gives a total of 2.66 per cent as the net cost of benefits, excluding administration expenses. If we assume that administration expense will absorb 10 per cent of the total income, the total cost would be 2.96 per cent of the pay roll."

(Latimer, House Hearings, p. 245.)

"The average annual compensation of all persons attached to the industry—perhaps that is not what is commonly known as the average annual wage, but is arrived at by dividing the total pay roll by the total

[fol. 268] number of persons in the industry—is $1,150. The total amount of payments of unemployment compensation to each 100 individuals—that is, 100 times 43 times $1.58—is $2,717.60. The total compensation for those 100 individuals is $115,000. So that the percentage of the pay roll required to support those benefits is 2.36.

"The Coordinator's figures were worked out at a time when it was assumed that there would be some provision for some partial unemployment, something on the order of what is now provided for in the State laws. While it is not possible for us to lay our figure on any particular assumption which resulted from that particular provision, it may be wise to make some allowance for these unknown assumptions. Consequently, for that and other reasons, we have added to that cost and allowance of one-eighth to cover these assumptions and other contingencies, so that the total cost of benefits is 2.66 per cent of the taxable pay roll."

(Latimer, Senate Hearings, pp. 139-140.)

Fifth—It is clear that the facilities furnished by this warehouse company are not railroad facilities. A situation of similar kind has lately (1941) been determined by the Interstate Commerce Commission in the case of *Growers Marketing Co.* v. *Pere Marquette Ry. Co.*, 248 I. C. C. 215. There a real estate company, the stock of which was held by three railroad carriers, owned a produce terminal which furnished facilities for display and sale of fresh fruits and vegetables at Detroit. In determining that those facilities were not railroad facilities, the Commission said this:

"Transportation of produce into the produce terminal was discussed by division 2 in *Reciprocal Switching at Detroit*, 215 I. C. C. 284, wherein increased switching charges were found not justified. The division said at pages 287 and 288:

'The produce terminal is not taxed under the laws of the State of Michigan as property devoted to railroad purposes, but the auxiliary yard is so [fol. 269] taxed. The Green Real Estate Company makes a charge of $4 per car for the labor furnished in unloading cars at the terminal building, and a like charge is made when cars are sold and

unloaded at the platforms. These charges, protestants point out, are not on file with this Commission. Transportation of this traffic ends when the cars are placed by the Union Belt in the produce terminal. The Green Real Estate Company is not subject to the Interstate Commerce Act and the charges referred to are for nontransportation services. It follows that these charges are not subject to our jurisdiction and there is no requirement that they may be published and filed.'

. . . . . .

"*Conclusions.*—We find that facilities provided for the display and sale of perishable produce delivered at the produce terminal are facilities for commercial transactions not part of transportation and therefore not subject to regulation under the provisions of the act.

"We further find that defendants were and are obligated to deliver perishable produce at the produce terminal when delivery is desired for the purpose of using the commercial facilities for display and sale of the produce, only in the event that consignees were and are entitled to the use of these facilities under the law applicable to their use." p. 227.

Sixth—On Monday, the 7th inst., the Supreme Court decided the case of *McLeod* v. *Threlkeld Commissary Company*. This involved the construction in the Fair Labor Standards Act of the phrase "engaged in commerce." The particular work involved was the preparation and service of meals by and independent contractor to maintenance of way employees of a railroad company. The petitioner, a cook, there sought coverage under the words of that statute as the majority here finds coverage under the Unemployment Insurance Act. The court, however, referring to [fol. 270] the history of the statute, held to the contrary and said this:

"Judicial determination of the reach of the coverage of the Fair Labor Standards Act 'in commerce' must deal with doubtful instances. There is no single concept of interstate commerce which can be applied to every federal statute regulating commerce. See

Kirschbaum v. Walling, supra, 520. However, the test of the Federal Employers' Liability Act that activities so closely related to interstate transportation as to be in practice and legal relation a part thereof are to be considered in that commerce, is applicable to employments 'in commerce' under the Fair Labor Standards Act.

"The effect of the over-refinement of factual situations which hampered the application of the Federal Employers' Liability Act, prior to the recent amendment, we hope, is not to be repeated in the administration and operation of the Fair Labor Standards Act. Where the accident occurs on or in direct connection with the instrumentalities of transportation, such as tracks and engines, interstate commerce has been used interchangeably with interstate transportation. But where the distinction between what a common carrier by railroad does while engaging in commerce between the states, i. e., transportation, and interstate commerce in general is important, the Federal Employers' Liability Act was construed prior to the 1939 amendment as applying to transportation only.

"The *Smith* case construed the Employers' Liability Act to apply to a cook and caretaker employed by the railroad to care for a camp car used for feeding and housing a group of the railroad's bridge carpenters. At the time of the accident the cook was engaged in these duties. In holding the cook was 'in commerce' this Court said:

> 'The circumstances that the risks of personal injury to which plaintiff was subjected were similar to those that attended the work of train employees generally and of the bridge workers themselves when off duty, while not without significance, [fol. 271] is of little moment. The significant thing, in our opinion, is that he was employed by defendant to assist, and actually was assisting, the work of the bridge carpenters by keeping their bed and board close to their place of work, thus rendering it easier for defendant to maintain a proper organization of the bridge gang and forwarding their work by reducing the time lost in going to and from their meals and their lodging place. If, in-

stead, he had brought their meals to them daily at the bridge upon which they happened to be working, it hardly would be questioned that his work in so doing was a part of theirs. What he was in fact doing was the same in kind, and did not differ materially in degree. Hence he was employed, as they were, in interstate commerce, within the meaning of the Employers' Liability Act.' 250 U. S. 101, 104.

Such a ruling under the Federal Employers' Liability Act, after the *Bolle*, *Industrial Commission* and *Bezue* cases, *supra*, note 9, should not govern our conclusions under the Fair Labor Standards Act. These three later cases limited the coverage of the Federal Employers' Liability Act to the actual operation of transportation and acts so closely related to transportation as to be themselves really a part of it. They recognized the fact that railroads carried commerce and were thus a part of it but that each employment that indirectly assisted the functioning of that transportation was not a part. The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it. Employee activities outside of this movement, so far as they are covered by wage-hour regulations, are governed by the other phrase, 'production of goods for commerce.' "

In concluding, I again draw attention to what this Board [fols. 272-284] said to the Congress in its annual report for the fiscal year ending 30 June 1938:

"Storage of property received for a carrier and awaiting transportation by the carrier, or awaiting delivery by the carrier following transportation, is an employer service; but performance of the usual commercial storage and warehouse business is not. Likewise, the operation of a grain elevator for the receipt of grain for transportation by railroad or for delivery of grain transported by railroad or for transfer of grain from one railroad to another for continued trans-

portation is a service of the type covered; but doing the business of a general commercial elevator is not the performance of an employer service." p. 142.

It is my opinion, and I conclude, that the Duquesne Warehouse Company is engaged in the conducting of a commercial warehouse business at Pittsburgh, Pa., and is not an employer within the terms or meaning of the Railroad Unemployment Insurance Act.

(Minority opinion of Railroad Retirement Board in Docket No. 18, Railroad Retirement Act proceeding, omitted in the printing of this record pursuant to stipulation of counsel. This opinion appears at side folios 45 to 57 of the printed record in case No. 95.)

[fol. 285]

Jun. 19, 1943.

Registered Mail

Mr. George R. Allen, Assistant General Counsel, Pennsylvania Railroad Company, Broad Street Station Building, Philadelphia, Pennsylvania.

Status of Duquesne Warehouse Company under the Railroad Unemployment Insurance Act, Jurisdictional Docket No. 18-A

Dear Sir:

I enclose herewith a copy of the Board's decision in the above-entitled proceeding.

Very truly yours, Mary B. Lankins, Secretary of the Board.

Enclosure.

Jun. 19, 1943.

Registered Mail

Mr. George M. Harrison, Grand President, Brotherhood of Railway & Steamship Clerks, Brotherhood of Railway Clerks Building, Cincinnati, Ohio.

Status of Duquesne Warehouse Company under the Railroad Unemployment Insurance Act, Jurisdictional Docket No. 18-A

Dear Sir:

I enclose herewith a copy of the Board's decision in the above-entitled proceeding.

Very truly yours, Mary B. Linkins, Secretary of the Board.

Enclosure.

[fol. 286] United States of America, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois

November 16, 1943.

Office of the General Counsel

The Honorable Charles E. Stewart, Clerk, United States District Court, District of Columbia, Washington, D. C.

Re: Duquesne Warehouse Company v. Railroad Retirement Board, Civil Action File No. 21586

Dear Sir:

Enclosed herewith are certified copies of two pages which should be added, as pages 346 and 347, to the certified transcript of record previously filed by the Board in the above action in compliance with Section 5(f) of the Railroad Unemployment Insurance Act (45 U. S. C. Sec. 355(f)), which provides that "Within fifteen days after receipt of service * * * the Board shall certify and file with the court * * * a transcript of the record upon which the findings and decision complained of are based."

The two pages transmitted herewith did not constitute part of the record upon which the Board's findings and decision complained of in this action were based and therefore were not included in the transcript of record previously filed. The plaintiff, however, has now requested their inclusion in the record, for the reason that they relate to the granting by the Board to the plaintiff, pursuant to authority vested in the Board by Section 5(f) of the Act, of an extension of time in which to file a petition for review of the final decision of the Board which is complained of in this action. I have consented to this request and am ac-

cordingly submitting the pages in question for incorporation in the record at this time.

Very truly yours, Joseph H. Freehill, General Counsel.

Enclosures.

Filed November 18, 1943.

[fol. 287] United States of America, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois

Murray W. Latimer, Chairman, M. R. Reed, L. M. Eddy

November 16, 1943.

I, Mary B. Linkins, Secretary of the Railroad Retirement Board, hereby certify that the attached two pages, numbered, for the purpose of this classification, 346 and 347 respectively, are true and correct copies of communications relating to the granting by the Board to the Duquesne Warehouse Company, pursuant to the authority vested in the Board by Section 5(f) of the Railroad Unemployment Insurance Act (45 U. S. C. Section 355(f)), of an extension of time in which to file a petition for review of the final decision of the Board in the Matter of the Status of the Duquesne Warehouse Company under the Railroad Unemployment Insurance Act, Jurisdictional Docket No. 18-A.

By mutual agreement of the parties to the action in the District Court of the United States for the District of Columbia, entitled "Duquesne Warehouse Company v. Railroad Retirement Board, Civil Action File No. 21586," the attached two pages are to be added to, and incorporated as part of, the certified transcript of record before the Board in the Matter of the Status of Duquesne Warehouse Company, under the Railroad Unemployment Insurance Act, Jurisdictional Docket No. 18-A, which transcript of record was filed by the Board in the action on October 27, 1943.

Mary B. Linkins, Secretary of the Board. (Seal.)

Filed November 18, 1943.

[fol. 288] WESTERN UNION TELEGRAM

WUA105 CAK SER—PHILADELPHIA PENN SEPT 8 1943 525P

MARY B LINKENS, SECRETARY
RAILROAD RETIREMENT BOARD

YOUR LETTER TWENTY FIRST ULTIMO LAST PARAGRAPH DUQUESNE WAREHOUSE COMPANY RE RAILROAD UNEMPLOYMENT INSURANCE ACT REQUEST IS HERE MADE FOR BOARD EXTENSION OF TIME TO AND INCLUDING OCTOBER FIFTEENTH NINETEEN FORTY THREE FOR FILING PETITION FOR REVIEW FINAL DECISION BOARD UNDER SECTION FIVE (F) UNEMPLOYMENT INSURANCE ACT PLEASE ADVISE PROMPTLY—

622P GEORGE R. ALLEN PRR.

"This copy is a true, accurate and exact copy of the document submitted.

(Signature) Chas. Ehrnfelt."

(Date) Nov. 15, 1943.

(Copy)

Telegram—Official Business—Government Rates, Railroad Retirement Board, Washington

September 9, 1943 11:45 a. m.

Mr. George R. Allen, Assistant General Counsel, Pennsylvania Railroad Company, 1740 Broad Street Station Building, Philadelphia, Pennsylvania.

REURTEL SEPTEMBER 8. TIME FOR FILING PETITION FOR REVIEW FINAL DECISION BOARD ON STATUS DUQUESNE WAREHOUSE UNDER UNEMPLOYMENT INSURANCE ACT EXTENDED TO AND INCLUDING OCTOBER 15, 1943.

Mary B. Linkins, Secretary Railroad Retirement Board.

"This copy is a true, accurate and exact copy of the document submitted.

(Signature) Chas. Ehrufelt."

(Date) Nov. 15, 1943.

[fol. 289] IN UNITED STATES DISTRICT COURT

MOTION OF BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES, FOR LEAVE TO INTERVENE AS PARTY DEFENDANT—Filed November 8, 1943

Now comes the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees, an international labor organization (hereinafter referred to as the "Brotherhood") acting in its own behalf and in behalf of certain employees of the plaintiff who are members of the said Brotherhood or are represented by it, and moves the Court for leave to intervene herein as a party defendant, to file its answer (a copy of which is tendered to the Court herewith), and to participate fully in all further proceedings herein as a party defendant, and in support of its said motion, represents to the Court as follows, to-wit:

1

The Brotherhood is an unincorporated association or labor union which numbers among its members substantially all of the employees of the plaintiff. The said Brotherhood is the duly selected and recognized collective bargaining representative of the said employees, and has heretofore negotiated with the plaintiff a collective bargaining agreement governing the working conditions of the said employees.

2

According to a decision of the Railroad Retirement Board rendered on February 11, 1943, and which is referred to in the complaint, the employees of the plaintiff are entitled to participate in the system of benefits provided by a statute of the United States known as the Railroad Unemployment Insurance Act. As stated in the complaint, it is the purpose of this action to set aside the said decision of the said Board. If, therefore, the plaintiff should prevail in [fol. 290] this action, the employees of the plaintiff will lose valuable rights under the said Railroad Unemployment Insurance Act.

3

The Brotherhood participated actively in said proceedings conducted by the Railroad Retirement Board prior

to the issuance of its decision aforesaid, and it and the employees represented by it, and in whose behalf it acts, are the real parties in interest in this case.

4

The interests of the said employees are fully represented herein by the said Brotherhood.

5

The sole defendant named in the complaint is the Railroad Retirement Board, which is a government agency having no financial interest in the outcome of this case, and the representation of the said interests of the said employees by the said Board may therefore be inadequate for the full protection of such interests.

6

The answer proposed to be filed by the intervener herein, which is tendered herewith, presents issues of law and fact which are common to and identical with the issues presented by the complaint of the plaintiff and the answer of the Railroad Retirement Board.

Wherefore, acting in its own behalf and in behalf of the employees of the plaintiff, all of whose interests it fully represents, the Brotherhood respectfully moves that this Court grant it leave to intervene in this proceeding, to file an answer herein, and to take such part in the further proceedings of this cause as may be necessary and appro- [fol. 291] priate to protect its interests and the interests of those whom it represents.

Edward C. Kriz, 1416 F Street, N. W., Washington, D. C.; Frank L. Mulholland, 1041 Nicholas Building, Toledo, Ohio; Clarence M. Mulholland, 1041 Nicholas Building, Toledo, Ohio; Willard H. McEwen, 1041 Nicholas Building, Toledo, Ohio, Attorneys for the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

ACKNOWLEDGEMENT OF RECEIPT AND CONSENT TO INTERVENTION—Filed November 8, 1943

Each of the undersigned hereby acknowledges receipt of a copy of the above motion, waives service or other and further notice of the filing of the same, and hereby consents that the same be granted.

McKenney, Flannery & Craighill, by R. A. Bogley, Attorneys for Plaintiff; Joseph H. Freehill, Attorney for defendant, Railroad Retirement Board.

[fol. 292] IN UNITED STATES DISTRICT COURT

ANSWER OF INTERVENING DEFENDANT, BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES—Filed November 9, 1943

Now comes the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees, intervening defendant in the above entitled action, and for its answer to the complaint of the plaintiff says:

1

It admits the truth of all allegations contained in Section 1 of the complaint.

2

The allegations of the second section of the complaint are admitted, except insofar as they may be construed as alleging that the plaintiff is engaged in no service or is operating no facility in connection with the transportation of property by railroad, within the meaning of the Railroad Unemployment Insurance Act, and to the extent that the said allegations may be so construed, they are denied.

3

It admits the truth of all allegations contained in Section 3 of the complaint.

4

It is admitted that Exhibits 1, 2 and 3, attached to the complaint, are true and correct copies of the documents of which they are alleged to be copies. This defendant has

no knowledge as to the truth or falsity of the other allegations contained in Section 4 of the complaint and hence denies the same for want of such knowledge.

[fol. 293]

5

It is admitted that Exhibits 4, 5, 6, and 7, attached to the complaint, are true and correct copies of the documents of which they are alleged to be copies. This defendant has no knowledge as to the truth or falsity of the other allegations contained in Section 5 of the complaint, and hence denies the same for want of such knowledge.

6

This defendant is advised and so represents to the Court that the statements contained in Section 6 of the complaint constitutes legal conclusions and require no answer from this defendant, but insofar as the same may be construed to be allegations of fact, this defendant has no knowledge as to their truth or falsity and hence denies the same for want of such knowledge.

7

It is admitted that Exhibits 8, 9, 10, 11, and 12, attached to the complaint, are true and correct copies of the documents of which they are alleged to be copies. This defendant has no knowledge as to the truth or falsity of the other allegations contained in Section 7 of the complaint, and hence denies the same for want of such knowledge.

8

It is admitted that Exhibits 13, 14, 15, 16, 17, 18, 19, and 20, attached to the complaint, are true and correct copies of the documents of which they are alleged to be copies. This defendant has no knowledge as to the truth or falsity of the other allegations contained in Section 8 of the complaint, and hence denies the same for want of such knowledge.

9

It is admitted that Exhibit 21, attached to the complaint, is a true and correct copy of the document of which it is alleged to be a copy, and it is further admitted that the Railroad Retirement Board did issue a certain decision [fol. 294] and opinion holding the plaintiff to be subject to the Railroad Unemployment Insurance Act, and that Ex-

hibit No. 22 attached to the complaint, is a true copy of such decision and opinion. This defendant has no knowledge as to the truth or falsity of the other allegations contained in Section 9 of the complaint, and hence denies the same for want of such knowledge.

10

In answer to Section 10 of the complaint, and in particular to the numbered subsections 1 to 6, inclusive, this defendant is advised and so represents to the Court that the statements contained therein constitute the conclusions of the plaintiff as to the legal effect of certain documentary evidence presented to the Railroad Retirement Board, that they are not allegations of fact, and that accordingly they require no answer from this defendant.

Insofar, however, as the statements contained in said subsections 1 to 6, inclusive, under Section 10 of the complaint may be held to constitute allegations of fact, this defendant is without knowledge as to the truth or falsity of the allegations of said subsections, and hence denies the same for want of such knowledge, except insofar as the said allegations are in accord with the findings of fact made by the Railroad Retirement Board in the opinion referred to in the complaint. To the extent that the said allegations are so in accord with the said findings, they are admitted.

11

It denies each and every allegation contained in Section 11 of the complaint.

12

The allegations of Section 12 of the complaint are denied.

13

The allegations of Section 13 of the complaint are denied.

[fol. 295] Wherefore, having fully answered the allegations of the complaint, this defendant prays that the same be denied and dismissed at Plaintiff's cost.

Edward C. Kriz, 1416 F Street, N. W., Washington, D. C.; Frank L. Mulholland, 1041 Nicholas Building, Toledo, Ohio; Clarence M. Hulholland, 1041 Nicholas Building, Toledo, Ohio; Willard H. McEwen, 1041 Nicholas Building, Toledo, Ohio.

In United States District Court

Order Granting Leave to Intervene and Making Additional Parties Defendants—Filed November 8, 1943

On consideration of the motion heretofore filed herein on behalf of the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees for leave to intervene herein and be made parties defendant, and it appearing that counsel for the plaintiff has consented thereto, it is, by the Court, this 8th day of November, 1943:

Ordered, that said motion be, and the same is hereby granted, and said Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees be, and they hereby are made parties defendant in the above entitled action.

F. Dickinson Letts, Justice.

No objection: McKenney, Flannery & Craighill, by R. A. Bogley, Attorneys for Plaintiff, Hibbs Building, Washington, D. C.

[fol. 296] In United States District Court

Notice of Motion for Summary Judgment

To: McKenney, Flannery and Craighill, Attorneys for Plaintiff, Hibbs Building, Washington, D. C.

Please Take Notice that on the 12th day of November, 1943, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, in the room customarily occupied by this Court for the hearing of motions, the defendant Railroad Retirement Board will move this Court for summary judgment in the defendant's favor dismissing the action, in accordance with Rule 56 of the Rules of Civil Procedure for the District Courts of the United States, on the ground that the petition for review and the answer of the defendant Board (which includes, as part thereof, a certified transcript of the Record before the Railroad Retirement Board in the Matter of the Status of Duquesne Warehouse Company under the Railroad Unemployment Insurance Act, Jurisdictional Docket No. 18A)

show that there is no genuine issue as to any material fact and that the defendant Board is entitled to judgment as a matter of law on the ground that the defendant Board's decision and findings of which review is sought are supported by substantial evidence in the record before the Board and are therefore valid and proper.

Joseph H. Freehill, General Counsel, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois. 910 17th St., N. W., Washington 25, D. C.

Chicago, Illinois, October 30, 1943.

[fol. 297] IN UNITED STATES DISTRICT COURT

MOTION OF PLAINTIFF, DUQUESNE WAREHOUSE COMPANY, FOR SUMMARY JUDGMENT—Filed December 6, 1943

Plaintiff, Duquesne Warehouse Company, by its attorneys, moves the Court under Rule 56(a) of the Federal Rules of Civil Procedure for summary judgment in favor of plaintiff, Duquesne Warehouse Company, on the following grounds:

1. There is no genuine issue as to any material fact; and

2. Plaintiff on the pleadings and the record now before the Court, which includes a certified transcript of the record before the Railroad Retirement Board in the matter of the status of Duquesne Warehouse Company under the Railroad Unemployment Insurance Act, is entitled to judgment reversing the decision of the Railroad Retirement Board holding that plaintiff is an "employer" under the Railroad Unemployment Insurance Act, as prayed in plaintiff's petition for review filed herein.

An oral hearing is requested.

McKenney, Flannery & Craighill, by R. A. Bogley, Hibbs Building, Washington, D. C., Attorneys for Plaintiff.

[fol. 298] IN UNITED STATES DISTRICT COURT

OPINION—Filed March 21, 1944

The question in this case is whether there is any substantial evidence to support the finding of the Railroad Retirement Board to the effect that the plaintiff, Duquesne

Warehouse Company, was an employer within the meaning of the Unemployment Insurance Act. The word "employer" is defined by Section 1(a) of that Act as follows:

> "The term 'employer' means any carriers (as defined in subsection (b) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, * * *."

It is conceded by the plaintiff that the Pennsylvania Railroad Company, a carrier, is the owner of the stock of the plaintiff. So the question is further limited to whether the plaintiff is engaged in the non-casual operation of equipment or facilities or the performance of non-casual service in connection with the transportation of property by railroad, or the receipt, delivery, transfer in transit, storage, or handling of property transported by railroad.

I think that it is clear that the business of the plaintiff company is that of a warehouseman conducting a commercial warehouse business.

I think too that it is clear that the plaintiff does not perform any service in connection with the transportation of passengers or property by railroad. The difficulty arises whether it performs any services in the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad. The [fol. 299] defendants contend that the word "transported" means "having been transported," but in my opinion, taking into consideration the whole legislative history of the act and the purposes of the act, it means rather "being transported" by a railroad and does not refer to the operations of the plaintiff as a warehouseman.

I have been furnished with an opinion of Judge Henry W. Goddard, a United States District Judge for the District Court of the United States of the Southern District of New York, holding that the plaintiff is not an employer within

the meaning of the Railroad Retirement Act, in which the language is the same as in the Unemployment Insurance Act and I agree with that opinion.

It results, therefore, that the motion of the defendants for a summary judgment should be overruled.

Jennings Bailey, Justice.

March 21, 1944.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING MOTION FOR SUMMARY JUDGMENT FILED BY DEFENDANT, RAILROAD RETIREMENT BOARD—Filed June 19, 1944

This cause having come on for hearing upon petition filed by plaintiff herein on October 12, 1943, to review the final decision of the Railroad Retirement Board, dated June 15, 1943, holding that plaintiff, Duquesne Warehouse Company, is an "employer" within the meaning of the Railroad Unemployment Insurance Act; answer thereto of defendant, Railroad Retirement Board; answer of intervening defendant, Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees; motion for summary judgment filed by defendant, Railroad Retirement Board, November 1, 1943, and motion for summary judgment filed by plaintiff December 6, 1943, and [fol. 300] there being no genuine issue as to any material fact, and, following oral argument, this Court having given due consideration to the issues presented and filed a memorandum opinion herein, dated the 21st day of March, 1944;

And It Appearing, that the finding of the Railroad Retirement Board, dated the 15th day of June, 1943, holding that plaintiff, Duquesne Warehouse Company, is an "employer" within the meaning of the Railroad Unemployment Insurance Act is unsupported by the evidence before said Board, it is this 19th day of June, 1944,

Adjudged, Ordered and Decreed, that the motion of plaintiff for summary judgment be and the same hereby is granted; and it is further

Adjudged, Ordered and Decreed, that the motion of defendant, Railroad Retirement Board, for summary judgment be and the same hereby is denied; and it is further

Adjudged, Ordered and Decreed that the action and decision of the Railroad Retirement Board as set forth in its final decision made and filed on the 15th day of June, 1943, be and the same hereby is reversed, set aside and annulled; and it is further

Adjudged, Ordered and Decreed that plaintiff, Duquesne Warehouse Company, have judgment on the issues herein on the merits against defendant, Railroad Retirement Board, and the intervening defendant, Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees, costs to be taxed against said intervening defendant.

Jennings Bailey, Justice.

[fol. 301] In United States District Court

[Title omitted]

Notice of Appeal—Filed September 18, 1944

Notice is hereby given that the Railroad Retirement Board, the defendant above-named, hereby appeals to the United States Court of Appeals for the District of Columbia from the final order and judgment entered in this action on June 19, 1944.

Dated: August 31, 1944.

Joseph H. Freehill, General Counsel and Attorney for Defendant, Railroad Retirement Board, 844 Rush Street, Chicago 11, Illinois.

To: McKenney, Flannery and Craighill, Attorneys for Plaintiff, Hibbs Building, Washington 5, D. C.; Frank L. Mulholland, Esq., Clarence M. Mulholland, Esq., Willard H. McEwen, Esq., Attorneys for Intervening Defendant, Suite 1041 Nicholas Building, Toledo 4, Ohio, and Edward C. Kriz, Esq., of Counsel, 1416 F. Street, N. W., Washington, D. C.

[fol. 302] In United States District Court

Notice of Appeal

Notice is hereby given that the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station

Employees, Intervening Defendants, hereby appeal to the United States Court of Appeals for the District of Columbia from the final order and judgment entered in this action on June 19th, 1944.

Edward C. Kriz, Kellogg Bldg., 1416 F St., N. W.

September 21st, 1944.

Frank L. Mulholland, Clarence M. Mulholland, Willard H. McEwen, Attorneys for Intervening Defendants.

To: McKenney, Flannery & Craighill, Attorneys for Plaintiff, Hibbs Bldg., Washington, D. C.; Joseph H. Freehill, General Counsel and Attorney for Defendant, Railroad Retirement Board, 910 17th Street, N. W., Wash., D. C.

[fol. 303] IN UNITED STATES DISTRICT COURT

ORDER SENDING ORIGINAL PAPERS TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA IN LIEU OF COPY—Filed October 28, 1944

The defendant and intervening defendant having appealed to the United States Court of Appeals for the District of Columbia from the final order and judgment entered in this action on June 19, 1944; the parties to the appeal having filed a stipulation as to the contents of the record on appeal; and the Court being of the opinion, in the premises, that the original Certified Transcript of the Record Before the Railroad Retirement Board in the Matter of the Status of Duquesne Warehouse Company Under the Railroad Unemployment Insurance Act, Jurisdictional Docket No. 18-A (247 pp.), which was filed with and made a part of the answer of the defendant Railroad Retirement Board in this proceeding and which has been stipulated by the parties to be part of the record on appeal, should be sent by the Clerk of this Court to the United States Court of Appeals for the District of Columbia in lieu of a copy of such document, it is this 28th day of October, 1944,

Ordered, That the original Certified Transcript of the Record Before the Railroad Retirement Board in the Mat-

ter of the Status of Duquesne Warehouse Company Under the Railroad Unemployment Insurance Act, Jurisdictional Docket No. 18-A (247 pp.), which was filed with and made a part of the answer of the defendant Railroad Retirement Board in this proceeding and which has been stipulated by the parties to be part of the record on appeal, should be sent by the Clerk of this Court to the United States Court of Appeals for the District of Columbia in lieu of a copy of such document.

(S.) D. D. O'Donoghue, Justice.

[fol. 304] We hereby consent to the entry of the above order:

(S.) David B. Schreiber, Acting General Counsel and Attorney for Defendant-Appellant Railroad Retirement Board, 844 Rush Street, Chicago 11, Illinois, and 910 17th Street, N. W., Washington 23, D. C.; (S.) Frank L. Mulholland; (S.) Clarence M. Mulholland; (S.) Willard H. McEwen, Attorneys for Intervening Defendant-Appellant, Suite 1041 Nicholas Building, Toledo 4, Ohio; (S.) Edward C. Kriz, Of Counsel, 1416 F Street, N. W., Washington, D. C.; (S.) R. W. Bagley, McKenney, Flannery and Craighill, Attorneys for Plaintiff-Appellee, Hibbs Building, Washington 5, D. C.

[fol. 305] In United States District Court

[Title omitted]

Order Extending Time for Filing Record on Appeal and Docketing Action in the United States Court of Appeals for the District of Columbia—Filed October 28, 1944

The defendant-appellant Railroad Retirement Board, by its attorney, David B. Schreiber, Acting General Counsel of the Board, having brought a motion for an order extending the last date for filing the record on appeal and docketing the action in the United States Court of Appeals for

the District of Columbia; and counsel for the plaintiff-appellee and the intervening defendant-appellant having consented thereto; and it further appearing that the time for filing the record on appeal and docketing the action has not expired, it is upon consideration thereof, this 28th day of October, 1944,

Ordered, That the last date for filing the record on appeal and docketing the action in the United States Court of Appeals for the District of Columbia be and the same hereby is extended from October 28, 1944, to November 11, 1944.

(S.) D. D. O'Donoghue, Justice.

[fol. 306] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO CONTENTS OF RECORD ON APPEAL—Filed October 13, 1944

It is hereby stipulated and agreed by and between the parties hereto that the record on appeal herein shall consist of the following items:

1. Petition for review, omitting, however, Exhibits 1-22, inclusive, of the petition, and substituting in lieu of such Exhibits the following explanatory notation:

(Exhibits 1-22, inclusive, of the petition have been omitted pursuant to stipulation: all the Exhibits, with the exception of Exhibit No. 5, consist of copies of papers contained in the Transcript of the Record Before the Railroad Retirement Board in the Matter of the Status of Duquesne Warehouse Company Under the Railroad Unemployment Insurance Act—Jurisdictional Docket No. 18-A, which transcript of record is set forth at pages —— through —— of this printed transcript; Exhibit No. 5 is a copy of Part 319 of the Railroad Retirement Board's Regulations Under the Railroad Unemployment Insurance Act, of which it is here agreed the Court may take judicial notice.

The text of the respective Exhibits of the petition, Exhibit No. 5 excepted, will be found in this printed

transcript, in accordance with the following table of page references:

[fol. 307]

Exhibit No.	Corresponding Pages of Record Before Board	Pages of This Printed Transcript Where Found
1	259	
2	261	
3	262-263	
4	264-265	
6	268	
7	273-283, 312-327	
8	41-42	
9	51-53, 56-57	
10	45-50	
11	44	
12	2-40	
13	68	
14	69	
15	76-81, 109-113	
16	74	
17	117-118	
18	119-124	
19	125-149	
20	186	
21	150-162	
22	195-230, 232-247	

2. Answer of defendant Railroad Retirement Board, with certified Transcript of the Record before the Railroad Retirement Board in The Matter of the Status of Duquesne Warehouse Company Under the Railroad Unemployment Insurance Act, Jurisdictional Docket No. 18-A (347 pages).

3. Motion of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees For Leave To Intervene as Party Defendant.

4. Answer of Intervening Defendant Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

5. Order granting motion of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and [fol. 308] Station Employees, for leave to intervene as

party defendant, to file its answer, and to participate in all proceedings herein.

6. Notice of motion of defendant Railroad Retirement Board for summary judgment.

7. Plaintiff's motion for summary judgment.

8. Decision and opinion of The Honorable Jennings Bailey, District Court Justice.

9. Final order and judgment entered June 19, 1944.

10. Notice of appeal of defendant Railroad Retirement Board.

11. Notice of appeal of intervening defendant.

12. Stipulation as to contents of record on appeal.

Dated: ——— ———, 1944.

David B. Schreiber, Acting General Counsel and Attorney for Defendant-Appellant Railroad Retirement Board, 844 Rush Street, Chicago 11, Illinois, and 910 17th Street, N. W., Washington 25, D. C.; Frank L. Mulholland, Clarence M. Mulholland, Willard H. McEwen, Attorneys for Intervening Defendant-Appellant, Suite 1041, Nicholas Building, Toledo 4, Ohio; Edward C. Kriz, of Counsel, 1416 F Street, N. W., Washington, D. C.; McKenney, [fol. 309] Flannery & Craighill, by R. A. Bogley, Hibbs Building, Washington 5, D. C.; George R. Allen, Attorneys for Plaintiff-Appellee.

[fol. 310] In United States Circuit Court of Appeals, District of Columbia

No. 8894

Railroad Retirement Board, et al., Appellants,

vs.

Duquesne Warehouse Company, Appellee

Minute Entry—March 19, 1945

On motion of Mr. Charles B. Murray, Mr. Myles F. Gibbons of the Bar of the Supreme Court of New York was permitted to argue for Appellant Railroad Retirement Board pro hac vice by special leave of Court.

On motion of Mr. John S. Flannery, Mr. George R. Allen of the Bar of the Supreme Court of Pennsylvania was permitted to argue for appellee pro hac vice by special leave of Court.

Argument commenced by Mr. Myles F. Gibbons, attorney for Appellant Railroad Retirement Board, continued by Mr. George R. Allen, attorney for appellee, and concluded by Mr. Willard H. McEwen, attorney for Appellant Brotherhood of Railway and Steamship Clerks, et al.

[fol. 311] IN UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA

No. 8894

RAILROAD RETIREMENT BOARD and BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, Appellants,

v.

DUQUESNE WAREHOUSE COMPANY, Appellee

Appeal from the District Court of the United States for the District of Columbia

Argued March 19, 1945. Decided May 14, 1945

Mr. Myles F. Gibbons, General Counsel, Railroad Retirement Board, with whom *Mr. David B. Schreiber*, Assistant General Counsel, and *Clara J. Cain*, Attorney, both of the Railroad Retirement Board, were on the brief, for appellant Railroad Retirement Board. *Mr. Charles B. Murray*, Assistant United States Attorney, Washington, D. C., also entered an appearance for Railroad Retirement Board.

Mr. Willard H. McEwen, with whom *Messrs. Frank L. Mulholland* and *Edward C. Kriz* were on the brief, for appellant Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

Mr. George R. Allen of the Bar of the Supreme Court of Pennsylvania, pro hac vice, by special leave of Court, with whom *Messrs. John Spalding Flannery* and *R. Aubrey Boothby* were on the brief, for appellee.

Before Groner, Chief Justice, and Miller and Arnold, Associate Justices

OPINION—Filed May 14, 1945

ARNOLD, Associate Justice:

The Duquesne Warehouse Company, appellee, brought these proceedings to set aside the decision of the Railroad Retirement Board, appellant, which declared that appellee was an employer within the meaning of the Railroad Unemployment Insurance Act. The court below reversed the Board and gave a summary judgment in favor of appellee warehouse company. From that judgment this appeal is taken.

It is conceded that appellee is a wholly-owned subsidiary of the Pennsylvania Railroad Company. The Board found that appellee was operating two warehouses equipped with platform sidings and other facilities for the receipt, delivery, and other handling of in-bound and out-bound freight transported by the Pennsylvania Railroad Company. Both of these warehouses were served by Pennsylvania's railroad tracks. One warehouse at East Liberty, Pennsylvania, [fol. 312] handles only sugar in carload lots which appellee unloads from or reloads on Pennsylvania's cars for the account of the shipper. The other warehouse, in Pittsburgh, handles diverse commodities coming in by both rail and truck in both carload and less-than-carload lots. Incoming less-than-carload shipments are unloaded and delivered to appellee on its platform by the railroad. Outgoing less-than-carload shipments are delivered to Pennsylvania's platform by appellee. Pennsylvania Railroad then issues its bill of lading, loads the freight and moves it out. Appellee's Pittsburgh warehouse is also an agency of the Pennsylvania Railroad to dispose of damaged freight which has been either refused by the shipper or is unclaimed. Appellee also renders storage-in-transit service. This means that when a carload of freight is shipped to a designated point over the railway, then taken out of the cars and stored in the warehouse and then is subsequently reshipped over the railroad, it is entitled to the through rate to the designated point instead of the combination of local rates to the warehouse and thence to the transit point.

The various types of operations in which appellee is engaged in connection with Pennsylvania's railroad transportation are shown by the following analysis of appellee's revenues from 1936 to 1938:

	Storage and handling of freight under storage-in-transit privileges	Storage and handling of other freight (including freight coming in or going out, or both, over Pennsylvania's rails)	Sale of damaged merchandise	Subleasing of space to manufacturing concerns
1936	$59,570.40	$63,011.60	$8,599.00	$32,732.00
1937	30,239.95	91,545.99	11,409.00	24,967.00
1938	29,836.01	73,702.99	8,881.86	16,035.17
	$119,646.34	$228,260.58	$28,889.86	$73,734.17

On the basis of these detailed findings the Board found generally that the appellee's operations were "intimately and integrally related to Pennsylvania's railroad transportation" and that appellee was engaged "in the non-casual operation of equipment and facilities and the performance of non-casual service in connection with Pennsylvania's transportation of property by railroad, * * * and the receipt, delivery, transfer in transit, storage, and handling of property transported by Pennsylvania by railroad." The Board concluded as a matter of law that appellee was an employer within the meaning of Section 1 (a) of the Railroad Unemployment Insurance Act and that compensated service rendered to appellee was creditable for the purpose of that Act.

The Act itself,[1] deleting the language not relevant here, defines an "employer" as follows:

> "The term 'employer' means * * * any company which is directly * * * owned * * * by one or more * * * carriers * * *, and which operates any * * * facility or performs any serv-
> [fol. 313] ice (except * * * casual service, and the casual operation of equipment or facilities) in connection with the transportation of * * * property by railroad, or the receipt, delivery, * * * storage, or handling of property transported by railroad, * * *"

[1] 52 Stat. 1094 (1938), 45 U. S. C. § 351(a) (1940).

In its opinion the Board summarized its reasons for concluding that the operations of appellee made it an employer under the Act in the following language:

> "In light of the general purpose of the . . . [Railroad Unemployment Insurance Act] and accepted doctrines of statutory construction, the Board has construed the carrier affiliate coverage provision as denoting services which are an integral part of, or are closely related to, the rail transportation system of a carrier and as including within its coverage (1) carrier affiliates engaged in activities which are themselves railroad transportation or which are rendered in connection with goods in the process of transportation, such as loading and unloading railroad cars, receipt, delivery, transfer in transit, and other handling of property transported by railroad; and also (2) carrier affiliates engaged in activities which enable a railroad to perform its rail transportation, such as maintenance and repair of way and equipment, and activities which enable a railroad to operate its rail system more successfully and to improve its services to the public, such as auxiliary bus transportation, dining facilities, and incidental warehousing services."

We agree with the Board's construction of the Act.[2] It follows the ordinary meaning of the words used in the statute. It achieves a common sense result well within what we conceive to be the policy of Congress, i. e., to cover the business of railroading as it is actually carried on. That the service rendered here is one habitually carried on by railroads as part of their business has been declared by the Supreme Court in the case of *Baltimore & Ohio Rail-*

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[2] In the case of *Duquesne Warehouse Co.* v. *Railroad Retirement Board* (decided March 12, 1945), the Circuit Court of Appeals for the Second Circuit has held to the contrary in construing identical language in a companion act, the Railroad Retirement Act, 45 U. S. C. § 228(a) (1940). We agree with the views of Judge Frank in his dissenting opinion filed in that case.

road Company v. United States,[3] where the Court observed that

> "All of the carriers 'now generally store freight on piers owned or leased by them and in warehouses operated by affiliated or subsidiary companies.' This business is carried on in various ways. Some carriers lease space to shippers for warehousing; others have aided in financing structures on their property in which they lease space from their own subsidiaries; and still others own directly the buildings and lease them to subsidiaries for warehouse operations. In all cases the carriers exercise sufficient control over the warehouse facilities to make them subservient to the competitive needs of the carriers. Their entrance into warehousing was brought about by a desire to induce shippers to use particular rail facilities and as first one and then the other of the carriers gained traffic by [fol. 314] their warehouse conveniences, it seemed necessary for their competitors to equip themselves with similar advantages."

We cannot believe that operations habitually carried on by railroads in connection with their transportation service and intimately connected with that service are not part of the business of railroading which the Act is intended to cover.

We will briefly discuss the contentions of the appellee. In the first place, it argues that the descriptive phrase "service in connection with the transportation of property by railroad" refers only to property in actual movement over the rails. For example, part of the service rendered by appellee is the disposition of damaged freight refused or unclaimed by the shipper. Such freight has to be stored and disposed of. During such storage it is no longer in movement. Hence appellee argues that such service is not in connection with the transportation of property. Instead it is a separate and independent enterprise like the independent business of warehousing. This strained construction of the language is rendered even more difficult by the fact that the Act includes "service in connection with * * * *storage or handling* of property *trans-*

[3] 305 U. S. 507, 516-517 (1939).

ported by railroad." The participle "transported" is certainly in the past tense. Appellee answers that by interpretation we must change the word "transported" to "being transported." This gets the desired result but it incidentally compels us to limit the term "storage" to enclosure in moving freight cars. This seems more ingenious than plausible.

A second contention of the appellee is that the phrase "in connection with the transportation of property" was taken from the Interstate Commerce Act and must be limited to the kind of service which comes within the coverage of the Interstate Commerce Act. We can find no evidence that such a limitation was intended.[4] It is true that the section we are construing does not apply to carriers *unless* they are subject to the Interstate Commerce Act. But the Hearings make it clear that all services performed by such carriers as part of the business of railroading are covered. That business is, of course, not restricted to the obligations which a railroad is compelled to perform as a minimum requirement of the Interstate Commerce Act.

Finally, it is argued that the legislative history of the Act compels the narrow interpretation urged by appellee. In support of this the appellee quotes from the testimony of witnesses at the hearings. Individual opinion of witnesses at a hearing is of doubtful value in the interpretation

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[4] The only support for this interpretation is found in the hearings on the Railroad Labor Act of 1934 (45 U. S. C. § 151), which contained similar language. Hearings before the Committee on Interstate Commerce, U. S. Senate, 73rd Cong. 2d Sess. (1934), S. 3266, pp. 10-11. Mr. Eastman testified that he thought this would be a possible interpretation of the language of the proposed bill. The Chairman of the Committee stated that it is "rather poor legislation, isn't it, generally," for one act to be interpreted by another. Mr. Eastman then stated: "I am not sure the language as it stands does cover all that it is intended to cover." The bill as finally passed does not appear to have included this limitation. The phrase "performs any service * * * in connection with the transportation of * * * property by railroad," is not included in the Interstate Commerce Act.

of an act.[5] But giving it full weight here, the testimony concerning the coverage of the Act goes no further than [fol. 315] to show that the Act was not intended to be extended beyond services in connection with transportation which were habitual and intimately connected with railroad operations. For example, the operation of a water carrier was held not to be such a service in the case of *Walling* v. *Baltimore Steam Packet Company*.[6]

The Board's interpretation of the Act is unquestionably entitled to respect by this court.[7] In the case before us there seems no reason for setting it aside and every reason for affirming it.

The judgment of the court below will be reversed and the cause remanded to enter a summary judgment affirming the decision of the Railroad Retirement Board.

Reversed and Remanded.

[File endorsement omitted.]

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[5] *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 493, 494 (1931).

[6] 144 F. (2d) 130 (C. C. A. 4th, 1944).

[7] *Skidmore* v. *Swift & Company*, 323 U. S. 134 (1944), at page 140:

> "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

[fol. 316] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, APRIL TERM, 1945

No. 8894

RAILROAD RETIREMENT BOARD and BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, Appellants,

vs.

DUQUESNE WAREHOUSE COMPANY, Appellee

Appeal from the District Court of the United States for the District of Columbia.

JUDGMENT—Filed May 14, 1945

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed and that this cause be, and it is hereby, remanded to the said District Court with directions to enter a summary judgment affirming the decision of the Railroad Retirement Board. Costs of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees on appeal to be borne by appellee.

Per Mr. Justice Arnold.

Dated May 14, 1945.

[fol. 317] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF RECORD—Filed May 28, 1945

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the

United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint appendix.
2. Minute entry of argument.
3. Opinion.
4. Judgment.
5. This designation.
6. Clerk's certificate.

Respectfully submitted, George R. Allen, Broad Street Station Building, Philadelphia, Pennsylvania. McKenney, Flannery & Craighill, by R. A. Bogley, Hibbs Bldg., Washington, D. C., Attorneys for Appellee.

[fol. 318] Certificate of Service

I, R. Aubrey Bogley, hereby certify that I have served a copy of the foregoing Designation of Record upon Myles F. Gibbons, Counsel for Appellant, Railroad Retirement Board, by leaving a copy thereof at his office, 910 17th Street, N. W., Washington, D. C. and upon Edward C. Kriz, Attorney for the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express & Station Employees, by leaving a copy thereof at his office, 1416 F. Street, N. W., Washington, D. C. on this 28th day of May, 1945.

R. A. Bogley.

[fol. 319] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 320] Supreme Court of the United States

Order Allowing Certiorari—Filed June 11, 1945

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted, and the case is consolidated with No. 1324, Railroad Retirement Board et al. vs. Duquesne Warehouse Co. for argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 321] IN THE SUPREME COURT OF THE UNITED STATES

No. 95. No. 103

STIPULATION RE PRINTING OF RECORDS—Filed July 9, 1945

It is hereby stipulated and agreed by and between counsel for the respective parties in the above entitled proceedings, said cases having been consolidated for argument, that the printed transcript of record in No. 95 as filed with the petition for certiorari therein be reprinted in its entirety for use in the hearing on the merits; that the printed transcript of record in No. 103 as filed with the petition for certiorari therein be reprinted in its entirety for use in the hearing on merits, except that the matter appearing on the following pages of said transcript be eliminated, with appropriate reference to the pages of the record in No. 95 where said material will be found:

To be eliminated from record in No. 103.	Reference to pages where material appears in record in No. 95.
Page 21 to page 198, all inclusive.	Page 58 to top of page 267, ending with words "Respectfully, (Signed) Geo. J. Schoeneman Deputy Commissioner".
[fol. 322]	
Page 199 beginning with words "RAILROAD RETIREMENT BOARD" to top of page 206, ending with the line "tion, to date, is creditable for purposes of that Act."	Page 19 to page 25, all inclusive.
Page 235 beginning with the lines "Opinion. Duquesne concedes that it is directly	Page 26 to page 45, ending with signatures "MURRAY W. LATIMER, CHAIRMAN, L. M.

To be eliminated from record in No. 103.	Reference to pages where material appears in record in No. 95
owned by Penn-" to page 255, ending with signatures "MURRAY W. LATIMER, CHAIRMAN, L. M. EDDY, Member."	EDDY, Member."
Page 272 beginning with line "RAILROAD RETIREMENT BOARD" to page 284.	Page 45 beginning with line "RAILROAD RETIREMENT BOARD" to page 57, ending with line "ing of Section 1(a) of the Railroad Retirement Act."

It is further understood and agreed that the cost of printing the records in the two proceedings will be borne one half by the petitioner in No. 103 and one half by the petitioners jointly in No. 95.

George R. Allen, R. Aubrey Bogley, Counsel for Duquesne Warehouse Company. Hugh S. Cox, Acting Solicitor General, Counsel for Railroad Retirement Board. Mulholland, Robie & McEwen, Edward C. Kriz, Counsel for Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express & Station Employees, and George M. Harrison, President of said Brotherhood.

[fol. 323] [File endorsement omitted.]

FILE COPY

Supreme Court, U. S.
FILED
MAY 28 1945
CHARLES ELMORE CROPLEY
CLERK

No. 5324 95

In the Supreme Court of the United States

OCTOBER TERM, 1944

RAILROAD RETIREMENT BOARD, BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES, AND GEORGE M. HARRISON, PETITIONERS

v.

DUQUESNE WAREHOUSE COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Railway Labor Act (48 Stat. 1185, 45 U. S. C. 151, First)	8
Social Security Act (52 Stat. 1110–1111, 53 *id.* 1374, 42 U. S. C. Sections 409 (b) (9), 1107 (c) (8), 45 U. S. C. Section 363 (a))	8

668121—45—1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No.—

RAILROAD RETIREMENT BOARD, BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES, AND GEORGE M. HARRISON, PETITIONERS

v.

DUQUESNE WAREHOUSE COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Railroad Retirement Board, and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and George M. Harrison pray that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Second Circuit entered on April 24, 1945 (R. 328), affirming the judgment of the District Court for the Southern District of New York (R. 292–293) setting aside and annulling a decision of the Railroad Retirement Board (R. 19–45) that the Duquesne Warehouse Company was an "employer" within the meaning of the Railroad Retirement Act.

OPINIONS BELOW

The opinions of the Circuit Court of Appeals (R. 302–323) have not yet been reported. The opinion of

the District Court (R. 282–292) is reported in 56 F. Supp. 87.

JURISDICTION.

The opinion of the Circuit Court of Appeals was entered on March 12, 1945 (R. 302). A petition for rehearing filed by the Board was denied on April 23, 1945 (R. 327). The judgment was entered April 24, 1945 (R. 328). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a warehouse company wholly owned by the Pennsylvania Railroad and engaged primarily in storage for shippers and consignees of goods transported or to be transported on the Pennsylvania is a company owned by a carrier and "which operates any equipment or facility or performs any service * * * in connection with the transportation of * * * property by railroad, or the receipt, delivery, * * * transfer in transit, storage, or handling of property transported by railroad" within the meaning of Section 1 (a) of the Railroad Retirement Act of 1937.

STATUTE INVOLVED

The statute involved is Section 1 (a) of the Railroad Retirement Act of 1937, 50 Stat. 307, 45 U. S. C. Section 228a (a), which is set forth in Appendix A, *infra*, pp. 10–11.

STATEMENT

In a proceeding to determine whether respondent Duquesne Warehouse Company was an employer

covered by the Railroad Retirement Act the Board held a hearing [1] and found that respondent was such an employer. Respondent thereupon brought suit in the District Court for the Southern District of New York to compel the Board to set aside its order, pursuant to the review provisions contained in Section 11 of the Act (45 U. S. C. Section 228k) (R. 3–11). The Brotherhood of Railroad Clerks and George M. Harrison, its president, were permitted to intervene as defendants (R. 277–278). The District Court granted summary judgment for the respondent (R. 292–293), and the Circuit Court of Appeals affirmed, Judge Frank dissenting (R. 302–323).

The facts disclosed by the record before the Board, which comprise the record before the Court (R. 18–271), may be summarized as follows:

Respondent is a Pennsylvania corporation all of whose stock is owned by the Pennsylvania Railroad Company, and whose principal officers are officers of the Pennsylvania (R. 59–61, 108, 133). It operates two warehouses, one in Pittsburgh and the other in East Liberty, within the Pittsburgh city limits, in buildings owned by the Pennsylvania and leased by it to respondent (R. 108–109, 133). Each building is on a rail siding, and part of the ground floor of

[1] The record before the Board consisted of questionnaires, affidavits and statements filed by the respondent company. The parties did not request that oral testimony be taken, but expressed satisfaction that the case be submitted on the record indicated (R. 249–250, 264). The case was argued orally before the Board by respondent and by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (R. 20).

each is retained by the Pennsylvania as a freight agency (R. 108, 133).

At the East Liberty warehouse, respondent handles and stores only one commodity, carload sugar, all of which comes in and goes out over Pennsylvania's rails (R. 61, 108, 134). The sugar is handled by respondent under storage-in-transit privileges covered by railroad tariffs filed by Pennsylvania with the Interstate Commerce Commission (R. 61–62, 135–136). Incoming shipments are consigned to the owner care of respondent, the route being designated as "Penn RR—For Stge in Transit"; and outgoing shipments are consigned to the owner, the bill of lading having a transit record number and being marked "accorded transit privilege at East Liberty, Pa." (R. 134, 170, 171). Respondent unloads the sugar from the Pennsylvania's railroad cars upon their arrival and reloads the sugar into Pennsylvania's railroad cars upon their departure (R. 61, 109, 134, 135).

At its Pittsburgh warehouse, respondent handles freight which has come in, or is destined for movement, over Pennsylvania's rails, or which has both come in and is going out over Pennsylvania's rails. Approximately 95 per cent of the commodities handled at that place, which commodities are diverse in character and are hauled in both carload and less-than-carload form, come in by rail, and approximately 60 per cent leave by rail (R. 108, 136–137). The services performed by respondent at the Pittsburgh warehouse are similar to those at East Liberty

in so far as car-load freight is concerned. Respondent loads and unloads the railroad cars as they come onto and depart from its platform, stores the railroad-transported goods, and performs other handling services in connection with the receipt and delivery of the railroad-transported goods (R. 62, 109–110, 133–134, 136–137). As to the less-than-carload freight, respondent, in addition to storing it, performs the handling involved in delivering it to and receiving it from Pennsylvania's platform. In the case of incoming less-than-carload shipments, the freight is unloaded by Pennsylvania from the cars to its platform and is delivered to and received by respondent on such platforms. In the case of outgoing less-than-carload shipments, respondent delivers the freight on to Pennsylvania's platform; Pennsylvania then issues its bill of lading, loads the freight into the cars, and moves them out. (R. 62, 109, 136–137).

Since 1922 the respondent has been a party to "salvage freight" agreements with the Pennsylvania whereby Pennsylvania turned over to respondent for resale and disposal damaged freight which had been refused or unclaimed by the owner (R. 62–63, 108, 137, 85–89, 179–184). For this service respondent retained 10 per cent of the gross proceeds plus certain costs and turned the balance over to Pennsylvania. The contracts contained provisions for the return of any such freight to Pennsylvania or the true owner, if his identity was ascertained or if he requested delivery before the goods were sold (R. 86–87, 101).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In affirming the judgment of the district court setting aside and annulling the decision of the Railroad Retirement Board that respondent is, and has been at least since August 28, 1935, an "employer" within the meaning of the Railroad Retirement Act.

2. In holding that Section 1 (a) of the Railroad Retirement Act reached only railroad subsidiaries or affiliates performing "acts done by or for the carrier" while its obligations persist".

3. In failing to hold that the Board's decision that respondent was an "employer" within the meaning of the Act was supported by substantial evidence and reasonably founded in law.

REASONS FOR GRANTING THE WRIT

1. On May 14, 1945 the United States Court of Appeals for the District of Columbia unanimously held that the respondent Duquesne Warehouse Company was an employer within the meaning of Section 1 (a) of the Railroad Unemployment Insurance Act (52 Stat. 1094; 45 U. S. C. Section 351(a)), the language of which is identical with Section 1(a) of the Railroad Retirement Act. The Court of Appeals noted that "the Circuit Court of Appeals for the Second Circuit has held to the contrary in construing identical language in the Railroad Retirement Act", and stated that "we agree with the views of Judge Frank in his dissenting opinion filed in that case". *Railroad Retirement Board* v. *Du-*

quesne Warehouse Co., No. 8894, decided May 14, 1945 (App. D. C.). The facts,[2] the issues and the parties in the two cases are identical, and the conflict is obvious. A copy of the opinion of the Court of Appeals for the District of Columbia is set forth *infra*, pp. 12–19.

2. The Railroad Retirement Board and the Court of Appeals for the District of Columbia have construed "in connection with the transportation of * * * property by railroad, or the receipt, delivery, * * * transfer in transit, * * * storage, or handling of property transported by railroad" as reaching services which are an integral part of or closely related—"functionally and economically" (R. 28)— to rail transportation. The court below, on the contrary, has construed the provision as denoting "transit" and covering only "acts done by or for the carrier while its obligations persist" (R. 305). Similar views have been expressed by the Circuit Courts of Appeals for the Fourth and Fifth Circuits. *Walling* v. *Baltimore Steam Packet Co.*, 144 F. 2d 130 (C. C. A. 4); *Allen* v. *Ocean Steamship Co.*, 123 F. 2d 469 (C. C. A. 5).

It is important that the construction of this provision of the Act be finally determined by this Court. The issues of statutory interpretation raised are not limited in effect to this respondent or even to railroad controlled warehouse companies. Questions have

[2] By stipulation in the Unemployment Insurance Act case, the records before the Retirement Board in the two cases were the same.

been raised as to freight forwarding companies, car repair and manufacturing companies and other concerns controlled by railroads but perhaps not performing a part of a carrier's "obligations" to shippers. Furthermore, similar or identical language is found in the Carriers Taxing Act (50 Stat. 435, 26 U. S. C. Section 1532 (a)), the Railroad Unemployment Insurance Act (52 Stat. 1094, 45 U. S. C. Section 351 (a)) and the Railway Labor Act (48 Stat. 1185, 45 U. S. C. 151, First). Employers subject to those statutes are exempt from the Social Security Act (52 Stat. 1110–1111, 53 id. 1374, 42 U. S. C. Sections 409 (b) (9), 1107 (c) (8), 45 U. S. C. Section 363 (a)) and from the National Labor Relations Act (49 Stat. 450, 29 U. S. C. Section 152 (2)). The taxes and benefits are not the same under the railroad acts and the Social Security Act, and continued uncertainty as to which statute applies to particular employers and employees is obviously confusing to both as well as to the Government agencies concerned.

3. In view of the clear conflict and the importance of a determination by this Court it seems unnecessary to argue the merits of the case in this petition. The Board's position is set forth in the opinion of the Court of Appeals for the District of Columbia (printed *infra*, pp. 12–19), and in the dissenting opinion of Judge Frank in the court below (R. 309–323).

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari be granted.

HUGH B. COX,
Acting Solicitor General.

MYLES F. GIBBONS,
General Counsel,
Railroad Retirement Board.

FRANK L. MULHOLLAND,
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Attorneys for Petitioners, Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees, and George M. Harrison.

MAY 1945.

APPENDIX A

Railroad Retirement Act of 1937, 50 Stat 307, as amended, 45 U. S. C. Section 228a (a):

SEC. 1. For the purposes of this Act—

(a) The term "employer" means any carrier (as defined in subsection (m) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: *Provided, however,* That the term "employer" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Board, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "employer" shall also in-

clude railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation; and railway labor organizations, national in scope, which have been or may be organized in accordance with the provisions of the Railroad Labor Act, as amended, and their State and National legislative committees and their general committees and their insurance departments and their local lodges and divisions, established pursuant to the constitution and bylaws of such organizations. The term "employer" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to an employer where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

APPENDIX B

United States Court of Appeals, District of Columbia

No. 8894

RAILROAD RETIREMENT BOARD AND BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, APPELLANTS

v.

DUQUESNE WAREHOUSE COMPANY, APPELLEE

Appeal from the District Court of the United States for the District of Columbia

Argued March 19, 1945—Decided May 14, 1945

Mr. Myles F. Gibbons, General Counsel, Railroad Retirement Board, with whom *Mr. David B. Schreiber*, Assistant General Counsel, and *Clara J. Cain*, Attorney, both of the Railroad Retirement Board, were on the brief, for appellant Railroad Retirement Board. *Mr. Charles B. Murray*, Assistant United States Attorney, Washington, D. C., also entered an appearance for Railroad Retirement Board.

Mr. Willard H. McEwen, with whom *Messrs. Frank L. Mulholland* and *Edward C. Kriz* were on the brief, for appellant Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

Mr. George R. Allen of the Bar of the Supreme Court of Pennsylvania, pro hac vice, by special leave of Court, with whom *Messrs. John Spalding Flannery* and *R. Aubrey Bogley* were on the brief, for appellee.

Before GRONER, Chief Justice, and MILLER and ARNOLD, Associate Justices

ARNOLD, *Associate Justice;* The Duquesne Warehouse Company, appellee, brought these proceedings to set aside the decision of the Railroad Retirement Board, appellant, which declared that appellee was an employer within the meaning of the Railroad Unemployment Insurance Act. The court below reversed the Board and gave a summary judgment in favor of appellee warehouse company. From that judgment this appeal is taken.

It is conceded that appellee is a wholly-owned subsidiary of the Pennsylvania Railroad Company. The Board found that appellee was operating two warehouses equipped with platform sidings and other facilities for the receipt, delivery, and other handling of in-bound and out-bound freight transported by the Pennsylvania Railroad Company. Both of these warehouses were served by Pennsylvania's railroad tracks. One warehouse at East Liberty, Pennsylvania, handles only sugar in carload lots which appellee unloads from or reloads on Pennsylvania's cars for the account of the shipper. The other warehouse, in Pittsburgh, handles diverse commodities coming in by both rail and truck in both carload and less-than-carload lots. Incoming less-than-carload shipments are unloaded and delivered to appellee on its platform by the railroad. Outgoing less-than-carload shipments are delivered to Pennsylvania's platform by appellee. Pennsylvania Railroad then issues its bill of lading, loads the freight and moves it out. Appellee's Pittsburgh warehouse is also an agency of the Pennsylvania Railroad to dispose of damaged freight which has been either refused by the shipper or is unclaimed. Appellee

also renders storage-in-transit service. This means that when a carload of freight is shipped to a designated point over the railway, then taken out of the cars and stored in the warehouse and then is subsequently reshipped over the railroad, it is entitled to the through rate to the designated point instead of the combination of local rates to the warehouse and thence to the transit point.

The various types of operations in which appellee is engaged in connection with Pennsylvania's railroad transportation are shown by the following analysis of appellee's revenues from 1936 to 1938:

	Storage and handling of freight under storage-in-transit privileges	Storage and handling of other freight (including freight coming in or going out, or both, over Pennsylvania's rails)	Sale of damaged merchandise	Subleasing of space to manufacturing concerns
1936	$59,570.40	$95,911.60	$8,599.00	$32,732.00
1937	30,239.93	91,545.99	11,409.00	24,967.00
1938	29,836.01	73,702.99	8,881.86	16,085.17
	$119,646.34	$228,260.58	$28,889.86	$73,784.17

On the basis of these detailed findings the Board found generally that the appellee's operations were "intimately and integrally related to Pennsylvania's railroad transportation" and that appellee was engaged "in the non-casual operation of equipment and facilities and the performance of non-casual service in connection with Pennsylvania's transportation of property by railroad, * * * and the receipt, delivery, transfer in transit, storage, and handling of property transported by Pennsylvania by railroad." The Board concluded as a matter of law that appellee was an employer within the meaning of Section 1 (a) of the Railroad Unemployment Insurance Act and that compensated service rendered to appellee was creditable for the purpose of that Act.

The Act itself,[1] deleting the language not relevant here, defines an "employer" as follows:

> The term "employer" means * * * any company which is directly * * * owned * * * by one or more * * * carriers * * *, and which operates any * * * facility or performs any service (except * * * casual service; and the casual operation of equipment or facilities) in connection with the transportation of * * * property by railroad, or the receipt, delivery, * * * storage, or handling of property transported by railroad, * * *.

In its opinion the Board summarized its reasons for concluding that the operations of appellee made it an employer under the Act in the following language:

> In light of the general purpose of the * * * [Railroad Unemployment Insurance Act] and accepted doctrines of statutory construction, the Board has construed the carrier affiliate coverage provision as denoting services which are an integral part of, or are closely related to, the rail transportation system of a carrier and as including within its coverage (1) carrier affiliates engaged in activities which are themselves railroad transportation or which are rendered in connection with goods in the process of transportation, such as loading and unloading railroad cars, receipt, delivery, transfer in transit, and other handling of property transported by railroad; and also (2) carrier affiliates engaged in activities which enable a railroad to perform its rail transportation, such as maintenance and repair of way and equipment, and activities which enable a railroad to operate

[1] 52 Stat. 1094 (1938), 45 U. S. C. §351 (a) (1940).

its rail system more successfully and to improve its services to the public, such as auxiliary bus transportation, dining facilities, and incidental warehousing services.

We agree with the Board's construction of the Act.[2] It follows the ordinary meaning of the words used in the statute. It achieves a common sense result well within what we conceive to be the policy of Congress, i. e., to cover the business of railroading as it is actually carried on. That the service rendered here is one habitually carried on by railroads as part of their business has been declared by the Supreme Court in the case of *Baltimore & Ohio Railroad Company* v. *United States*,[3] where the Court observed that

> All of the carriers "now generally store freight on piers owned or leased by them and in warehouses operated by affiliated or subsidiary companies." This business is carried on in various ways. Some carriers lease space to shippers for warehousing; others have aided in financing structures on their property in which they lease space from their own subsidiaries; and still others own directly the buildings and lease them to subsidiaries for warehouse operations. In all cases the carriers exercise sufficient control over the warehouse facilities to make them subservient to the competitive needs of the carriers. Their entrance into warehousing was brought about by a desire to induce shippers to use particular rail facilities and as first one and then the

[2] In the case of *Duquesne Warehouse Co.* v. *Railroad Retirement Board* (decided March 12, 1945), the Circuit Court of Appeals for the Second Circuit has held to the contrary in construing identical language in the Railroad Retirement Act, 45 U. S. C. §228 (a) (1940). We agree with the views of Judge Frank in his dissenting opinion filed in that case

[3] 305 U. S. 507, 516–517 (1939).

other of the carriers gained traffic by their warehouse conveniences, it seemed necessary for their competitors to equip themselves with similar advantages.

We cannot believe that operations habitually carried on by railroads in connection with their transportation service and intimately connected with that service are not part of the business of railroading which the Act is intended to cover.

We will briefly discuss the contentions of the appellee. In the first place, it argues that the descriptive phrase "service in connection with the transportation of property by railroad" refers only to property in actual movement over the rails. For example, part of the service rendered by appellee is the disposition of damaged freight refused or unclaimed by the shipper. Such freight has to be stored and disposed of. During such storage it is no longer in movement. Hence appellee argues that such service is not in connection with the transportation of property. Instead it is a separate and independent enterprise like the independent business of warehousing. This strained construction of the language is rendered even more difficult by the fact that the Act includes "service in connection with * * * *storage or handling* of property *transported* by railroad." The participle "transported" is certainly in the past tense. Appellee answers that by interpretation we must change the word "transported" to "being transported." This gets the desired result but it incidentally compels us to limit the term "storage" to enclosure in moving freight cars. This seems more ingenious than plausible.

A second contention of the appellee is that the phrase "in connection with the transportation of

property" was taken from the Interstate Commerce Act and must be limited to the kind of service which comes within the coverage of the Interstate Commerce Act. We can find no evidence that such a limitation was intended.[4] It is true that the section we are construing does not apply to carriers *unless* they are subject to the Interstate Commerce Act. But the Hearings make it clear that all services performed by such carriers as part of the business of railroading are covered. That business is, of course, not restricted to the obligations which a railroad is compelled to perform as a minimum requirement of the Interstate Commerce Act.

Finally, it is argued that the legislative history of the Act compels the narrow interpretation urged by appellee. In support of this the appellee quotes from the testimony of witnesses at the hearings. Individual opinion of witnesses at a hearing is of doubtful value in the interpretation of an act.[5]

[4] The only support for this interpretation is found in the hearings on the Railroad Labor Act of 1934 (45 U. S. C. § 151), which contained similar language. Hearings before the Committee on Interstate Commerce, U. S. Senate, 73rd Cong. 2d Sess. (1934), S. 3266, pp. 10–11. Mr. Eastman testified that he thought this would be a possible interpretation of the language of the proposed bill. The Chairman of the Committee stated that it is "rather poor legislation, isn't it, generally," for one act to be interpreted by another. Mr. Eastman then stated: "I am not sure the language as it stands does cover all that it is intended to cover." The bill as finally passed does not appear to hav included this limitation. The phrase "performs any service * * * in connection with the transportation of * * * property by railroad," is not included in the Interstate Commerce Act.

[5] *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488, 493, 4 (1931).

But giving it full weight here, the testimony concerning the coverage of the Act goes no further than to show that the Act was not intended to be extended beyond services in connection with transportation which were habitual and intimately connected with railroad operations. For example, the operation of a water carrier was held not to be such a service in the case of *Walling* v. *Baltimore Steam Packet Company*.[6]

The Board's interpretation of the Act is unquestionably entitled to respect by this court.[7] In the case before us there seems no reason for setting it aside and every reason for affirming it.

The judgment of the court below will be reversed and the cause remanded to enter a summary judgment affirming the decision of the Railroad Retirement Board.

Reversed and Remanded.

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[6] 144 F. (2d) 130 (C. C. A. 4th, 1944).

[7] *Skidmore* v. *Swift & Company*, 323 U. S. 134 (1944), at page 140:

"We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1038 103

DUQUESNE WAREHOUSE COMPANY, *Petitioner*,

v.

RAILROAD RETIREMENT BOARD AND BROTHERHOOD OF RAILWAY AND STEAMSHIP-CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

GEORGE R. ALLEN,
JOHN S. FLANNERY,
R. AUBREY BOGLEY,
Counsel for Petitioner.

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IN THE

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RAILROAD RETIREMENT BOARD AND BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Petitioner, Duquesne Warehouse Company, respectfully prays that a writ of certiorari issue to review the final decision of the United States Court of Appeals for the District of Columbia entered on May 14, 1945 (R. 316), reversing the judgment of the District Court of the United States for the District of Columbia (R. 299-300), which set aside and annulled a decision of the Railroad Retirement Board that the Duquesne Warehouse Company is an "employer" within the meaning of the Railroad Unemployment Insurance Act (R. 227-284).

Petitioner respectfully requests that this Court review the decision below, along with its consideration of the directly conflicting decision of the United States Circuit Court of Appeals for the Second Circuit in the case of *Railroad Retirement Board, et al.* v. *Duquesne Warehouse Company*, involving the identical issue here presented; respondents here, petitioners in that case, having filed with this Court on May 28, 1945 petition for writ of certiorari to review that decision (No. 1324, October Term, 1944).

Opinions Below.

The opinion in the District Court is not reported and will be found at pages 298-299 of the record. The opinion of the United States Court of Appeals for the District of Columbia has not yet been reported and will be found at pages 311-315 of the record.

Basis for Jurisdiction.

It is competent for this Court to require by certiorari that the cause be certified to it for review pursuant to the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, amending and re-enacting Section 240(a) of the Judicial Code, 28 U. S. C. A., Sec. 347, and Rule 38 of the Rules of this Court.

Question Presented.

Whether a warehouse company, whose stock is owned by a railroad company subject to Part I of the Interstate Commerce Act, but which conducts a commercial warehouse business separate from the business of the railroad company, although the majority of its traffic comes in and moves out by that railroad, is a "company * * * which operates any equipment or facility or performs any service * * * in connection with the transportation of * * * property by railroad, or the receipt, delivery, elevation, transfer in transit, * * * storage, or handling of property transported by railroad," and hence an "employer" within the meaning of Section 1(a) of the Railroad Unemployment Insurance Act.

Statute Involved.

The statute involved is the Railroad Unemployment Insurance Act, Act of June 25, 1938, c. 680, Sec. 1(a) (52 Stat. 1094), as amended August 13, 1940, c. 664, Sec. 1 (54 Stat. 785), and October 10, 1940, c. 842, Sec. 20 (54 Stat. 1094), U. S. C. Title 45, Secs. 351 (a), 355 (c) (f).

Summary Statement of Matter Involved.

This is a coverage case arising under the Railroad Unemployment Insurance Act. Petitioner, Duquesne Warehouse Company, hereinafter referred to as "Duquesne," filed suit in the District Court of the United States for the District of Columbia to review the decision of the Railroad Retirement Board that petitioner is an "employer" under Sec. 1(a) of the Railroad Unemployment Insurance Act. The District Court (Bailey, J.) set aside and annulled that determination (R. 298-300).

The judgment of the District Court was reversed by the United States Court of Appeals for the District of Columbia, Chief Justice Groner and Associate Justices Miller and Arnold sitting, opinion by Associate Justice Arnold, May 14, 1945, and the case was remanded to the District Court with instructions to enter a summary judgment affirming the decision of the Railroad Retirement Board (R. 316).

The issue in this case is identical with that presented in the case of *Railroad Retirement Board, et al. v. Duquesne Warehouse Company*, No. 1324, October Term, 1944, wherein petition for writ of certiorari was filed in this Court on the 28th day of May, 1945, to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, involving the coverage of the Duquesne Warehouse Company under the Railroad Retirement Act. The definition of "employer" in the Retirement Act is identical with that contained in the Unemployment Insurance Act. The facts in the two cases are the same and the parties are the same, with the exception that George M. Harrison, Presi-

dent of the Brotherhood, intervened, along with the Brotherhood, in the Retirement Act case and not in the instant case. The record before the Retirement Board in the Retirement Act proceeding also constituted the record before the Board in the Unemployment Act proceeding and this record was before the Courts below in both cases here sought to be reviewed.

In the Retirement Act case, No. 1324, suit was brought by Duquesne in the District Court of the United States for the Southern District of New York to set aside the final determination of the Railroad Retirement Board that it was an "employer" under the Railroad Retirement Act and that Court (Goddard, J.) set aside and annulled that determination (R. 282-292 in No. 1324), 56 Fed. Supp. 87. The judgment of the District Court was affirmed by the United States Circuit Court of Appeals for the Second Circuit, Circuit Judges Chase, Hutcheson and Frank sitting, opinion by Circuit Judge Hutcheson, Judge Frank dissenting, March 12, 1945 (R. 302-323 in No. 1324), and rehearing was denied April 23, 1945 (R. 327 in No. 1324).

In both the Unemployment Insurance Act and the Retirement Act the definition of "employer," insofar as material here, reads as follows:

> "The term 'employer' means any carrier (as defined in subsection (b) of this section); and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, * * *"[1]

---

[1] Subsection (b) defines the term "carrier" as "an express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act." Act of February 4, 1887, c. 104 (24 Stat. 379), U. S. C. Title 49, Sec. 1, *et seq.*

This same definition is carried in the Carriers Taxing Act of 1937, Act of June 29, 1937, c. 405 (50 Stat. 435), U. S. C. Title 45, Sec. 261 (a). The Taxing Act is the companion statute under which money is collected for the payment of annuities and pensions under the Retirement Act.

Likewise, the Railway Labor Act as amended, Act of June 21, 1934, c. 691 (48 Stat. 1185), U. S. C. Title 45, Sec. 151, carries an employer definition almost identical with that in dispute here.[2]

Duquesne, whose stock is wholly owned by The Pennsylvania Railroad Company (R. 23), hereinafter referred to as "Pennsylvania," was incorporated under the laws of the Commonwealth of Pennsylvania, August 1, 1906, "for the purpose of conducting a storage and warehouse business" (R. 31). It has no other charter powers. It issues warehouse receipts under the governing Pennsylvania statute, copies of which appear in the record (R. 117-118). Its services are under the direction of a Superintendent "who has full and unrestricted authority to conduct a commercial warehouse business in accordance with the charter of the company" (R. 85). It has long been classed in the trade as a warehouseman conducting a commercial warehouse business. During the life of the National Industry Recovery Act, Act of June 16, 1933, c. 90 (48 Stat. 195), it was a subscriber to the Code of Fair Competition for the Merchandise Warehousing Trade, and was assigned a specific certificate number under that Code (R. 135).

"Its operations are confined to two warehouses, one at East Liberty and the other at Pittsburgh. Both warehouses

---

[2] "The term 'carrier' includes any express company, sleeping car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad. * * *" (Sec. 1, First.)

are owned by the railroad company and leased to the warehouse company with the exception of a portion of each building on the ground floor which is retained by the railroad company and used and officially designated by the railroad company as its freight agency. The railroad company maintains an agency force at each. These stations are fully equipped with tracks and other facilities for the receipt, delivery and handling of inbound freight and outbound, both carlot and less. The operations of each are separate from the operations of the warehouse. Each warehouse has a siding where delivery is made by the railroad company in carlots to the warehouse company. The owner unloads. The warehouse company performs the work and charges the owner. On outbound carload shipments the owner loads on the same siding. The warehouse company does the work and charges the owner. On inbound deliveries and outbound shipments of less than carload freight such delivery and receipt are made and given by the railroad agency at the warehouse. Inbound the warehouse company takes the freight from the railroad platform, and outbound delivers it at the railroad platform. It receipts to the railroad inbound, and takes a railroad bill of lading outbound" (R. 81).

At East Liberty the only commodity handled is sugar in carloads. "Delivery is made to the warehouse company in placing the car on the siding of the warehouse company." (R. 81). At the other warehouse in Pittsburgh proper, both carload and less-than-carload shipments are handled, and the operations there as to carload shipments are similar to those at East Liberty (R. 232).

Carload freight is carried by the Pennsylvania at carloads rates (R. 82); and loading and unloading by the owner is required by governing railroad tariffs. While the freight is in the warehouses it is under the exclusive control and direction of the owner. The responsibility of Duquesne is that of warehouseman. During that time the services accorded the property are the usual commercial warehouse services, such as storing, segregating, packaging, as-

sembling and the like for distribution from Pittsburgh as a center (R. 82).

Some of the freight which comes into the warehouse by rail and moves out by rail is entitled, insofar as the railroad is concerned, to what is known as a transit privilege. That is, it moves on a local rail rate to Pittsburgh, and on outbound movement takes the through rail rate from initial shipping point to ultimate destination, which is usually lower than the combination of the locals into Pittsburgh and out. This is generally called storage-in-transit, but is in fact storage out of transit. The arrangement is altogether as between the owner of the goods and the railroad. It relates to railroad rates only. Duquesne has no part in it. This tariff rule of the Pennsylvania obtains at Pittsburgh on other commodities and at other points on the Pennsylvania as to other named commodities and is open to all shippers (R. 83).

All freight delivered by Pennsylvania to Duquesne, or received by Pennsylvania from Duquesne, is carried by Pennsylvania at tariff rates which are subject to its Consolidated Freight Classification, Section 1, Rule 23 of which provides:

> "Carriers' agents must not act as agents of shippers or consignees for the assembling or distribution of C. L. or L. C. L. freight" (R. 85).

Duquesne "sublets parts of the building at Pittsburgh to tenants who conduct their business there. They are chiefly manufacturing concerns or representatives of manufacturers. The warehouse company has nothing to do with any shipments delivered to them or shipped by them. The railroad treats them the same as any other patrons" (R. 84).

Duquesne has an independent contractor arrangement with Pennsylvania for the disposal of such of its refused, damaged and unclaimed freight as Pennsylvania may care to deliver to the warehouse (R. 128-133). Duquesne reconditions and sells it at a charge of 10 per cent of the gross proceeds, plus any necessary expenses in reconditioning

and handling such as drayage. This is after the freight has finished its transportation and is turned over to Duquesne for disposal by Pennsylvania in a separate and independent transaction (R. 84). This freight has been handled under two contracts—one dated 1 February 1922, and the other dated 2 January 1941. Under neither agreement has any of the freight been delivered by Duquesne to consignee, nor under either agreement has Duquesne under the direction of Pennsylvania ever disposed of any freight which has become so worthless as to be unsalable (R. 127). This is the only money which Duquesne receives from Pennsylvania. During the three years of operation as shown in the record the gross revenues received by Duquesne under this arrangement total less than .7 per cent of Duquesne's gross revenues for all services during those years (R. 233).

For a short period of time—1937-8—Duquesne conducted a similar warehouse business at Erie, Pa., where the only commodity handled was newsprint paper in carloads. It was unloaded inbound on private siding and loaded outbound on the same siding, as is presently done with sugar by Duquesne at East Liberty (R. 86, 232).

Employees of Duquesne are on its payroll only. They are hired by it and discharged by it, and paid solely from its funds. They have a written working agreement with Duquesne and not with Pennsylvania. They are not accorded free transportation by Pennsylvania. Nor are they permitted to become members in two organizations of Pennsylvania, whose memberships are restricted in one instance to its employees and in the other to its employees and former employees. Duquesne has operated and paid under the Federal Social Security Act, and also makes contributions under the State Unemployment Compensation Law (R. 85).

Duquesne files no tariffs with the Interstate Commerce Commission or any state commission. Nor is it a party to any tariff of any railroad company or other common carrier (R. 86).

In the valuation of properties of Pennsylvania—22 I. C. C. Valuation Reports—under the requirements of Section 19

(a) of the Interstate Commerce Act, Part I, these two warehouses where Duquesne conducts its business are not classified as properties devoted to railroad transportation (R. 86).

Errors to be Urged.

The Court below erred:

1. In reversing the judgment of the District Court and remanding the cause with instructions to enter a summary judgment affirming the decision of the Railroad Retirement Board that petitioner is an "employer" within the meaning of Section 1(a) of the Railroad Unemployment Insurance Act.

2. In holding that the services which Duquesne renders in its commercial warehouse business are so "closely related to the rail transportation system" of the Pennsylvania and so "intimately connected with" its operations as to be a part of the business of railroads which the Railroad Unemployment Insurance Act was intended to cover.

3. In failing to hold that "service * * * in connection with the transportation of * * * property by railroad," as provided in Section 1(a) of the Railroad Unemployment Insurance Act, relates only to service rendered while the property is in the process of railroad transportation and in the possession of the railroad company.

4. In failing to hold that the Railroad Unemployment Insurance Act relates to the railroad industry and that its coverage does not extend to the warehouse industry.

Reasons Relied on for the Allowance of the Writ.

1. On March 12, 1945, the United States Circuit Court of Appeals for the Second Circuit held that petitioner, Duquesne Warehouse Company, was not an "employer" within the meaning of Sec. 1(a) of the Railroad Retirement Act of 1937, 50 Stat. 307, 45 U. S. C., Sec. 228 a (a), the language of which is identical with Sec. 1(a) of the Railroad Unemployment Insurance Act here involved. That case

and the one here sought to be reviewed were tried in the respective District Courts upon motions for summary judgments on the same record, which by stipulation, had been treated by the Board as the record in both proceedings before it. The facts, the issues and the parties in the two cases are identical, except that George M. Harrison, President of the Brotherhood, intervened in the Railroad Retirement Act case and not in the instant case.

The decision of the United States Court of Appeals for the District of Columbia, the review of which is here prayed, is in direct and complete conflict with the decision of the United States Circuit Court of Appeals for the Second Circuit as set forth in the majority opinion of that Court. The opinion of the United States Court of Appeals for the District of Columbia appears at record pages 311-315, and the majority and dissenting opinions of the United States Circuit Court of Appeals for the Second Circuit appear in the record in this Court in No. 1324, October Term, 1944, at pages 302-323.

The decision below also is in conflict with the decisions in *Ocean S. S. Co. of Savannah* v. *Allen, Collector*, 36 F. Supp. 851, affirmed 123 F. 2d 469 (C. C. A. 5, 1941); *Baltimore Steam Packet Co.* v. *Magruder, Collector*, 50 F. Supp. 639, affirmed 144 F. 2d 130 (C. C. A. 4, 1944); and *Interstate Transit Lines* v. *United States*, 56 F. Supp. 332 (D. C. Nebraska, Omaha Div.).

2. These conflicting decisions involve an important question of national scope relating to the administration of Federal statutes dealing with the railroad industry, particularly as to their coverage of the warehousing and other industries whose services are not connected with railroad transportation but may bear a remote relation thereto. Identical definitions of the term "employer" are found in the Railroad Unemployment Insurance Act, 52 Stat. 1094, 45 U. S. C. Sec. 351(a), the Railroad Retirement Act of 1937, 50 Stat. 307, 45 U. S. C. Sec. 228 a (a), and the Carriers Taxing Act, 50 Stat. 435, 26 U. S. C. Sec. 1532(a), and

a similar definition is found in the Railway Labor Act, 48 Stat. 1185, 45 U. S. C. 151, First. Employers subject to these statutes are exempt from the provisions of the Social Security Act (52 Stat. 1110-1111, 53 Id. 1374, 42 U. S. C. Sections 409 (b) (9), 1107 (c) (8), 45 U. S. C. Section 363 (a) and from the National Labor Relations Act 49 Stat. 450, 29 U. S. C. Section 152 (2)), under which the taxes and benefits are not the same as those under the aforementioned Railroad acts.

3. As the obvious conflict and the importance of the question involved so clearly demonstrates the necessity for a review by this Court of the decision below, along with that of the United States Circuit Court of Appeals for the Second Circuit, petitioner has not attempted in this petition to set forth at length its contentions on the merits of the controversy. The position of petitioner is stated at some length in the dissenting opinion of M. R. Reed, Member, Railroad Retirement Board (R. 256-284), and in the opinion of Circuit Judge Hutcheson, appearing at record pages 302-308, in No. 1324, October Term, 1944, in this Court.

Conclusion.

It is respectively submitted that a writ of certiorari should issue from this Court to review the decision of the United States Court of Appeals for the District of Columbia, along with the conflicting decision of the United States Circuit Court of Appeals for the Second Circuit, which respondents have petitioned this Court to review in No. 1324, October Term, 1944.

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IN THE

Supreme Court of the United States

No. 95

RAILROAD RETIREMENT BOARD, ET AL.,

Petitioners,

vs.

DUQUESNE WAREHOUSE COMPANY,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

No. 103

DUQUESNE WAREHOUSE COMPANY,

Petitioner,

vs.

RAILROAD RETIREMENT BOARD, ET AL.,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the District of Columbia

BRIEF OF BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AND GEORGE M. HARRISON, PETITIONERS IN NO. 95, RESPONDENTS IN NO. 103.

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IN THE

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No. 95

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BRIEF OF BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AND GEORGE M. HARRISON, PETITIONERS IN NO. 95, RESPONDENTS IN NO. 103.

STATEMENT OF THE CASE

These cases come before the Court on writs of certiorari directed to the United States Circuit Court of Appeals for the Second Circuit (as to No. 95), and the United States Court of Appeals for the District of Columbia (as to No. 103). In these two cases, the Duquesne Warehouse Company has challenged two decisions of the Railroad Retirement Board holding that Duquesne is and

has been an employer within the meaning of the Railroad Retirement Act and the Railroad Unemployment Insurance Act, respectively. These two statutes define the word "employer" in the same words. The two decisions of the Board are based on the same record. Accordingly, the cases are identical in both their legal and factual backgrounds.

The case designed to set aside the Board's decision under the Railroad Retirement Act was filed in the United States District Court for the Southern District of New York, and the other case, in the United States District Court for the District of Columbia. In each case, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, and its President, George M. Harrison, intervened as parties defendant. Each District Court entered judgment for the plaintiff in the case before it. The opinion of the New York District Court is reported in 56 Fed. Supp. 87, that of the District Court for the District of Columbia is not officially reported. See page 282 of the record in No. 95, and page 71 of the record in No. 103. Appeals were taken from both decisions by the original and intervening defendants. The decision of the United States District Court for the Southern District of New York was sustained by the United States Circuit Court of Appeals for the Second Circuit, Judge Frank dissenting, 148 F. (2d) 473. The decision of the United States District Court for the District of Columbia was reversed by the United States Court of Appeals for the District of Columbia in a unanimous opinion reported in 149 F. (2d) 507. This Court has ordered the cases consolidated for the purpose of briefing and argument.

STATEMENT OF FACTS

The Duquesne Warehouse Company is a Pennsylvania corporation, all of whose capital stock is owned by the Pennsylvania Railroad Company. (R. 59-61, 108, and 133.)* It operates two warehouses, one in Pittsburgh, Pennsylvania, and the other at a point known as East Liberty, Pennsylvania, which, however, is also within the Pittsburgh city limits. Both warehouses are located in buildings owned by the Pennsylvania Railroad Company and in each, the railroad operates a freight agency of its own.

At the East Liberty warehouse, Duquesne handles as its only commodity bulk sugar. All of this comes to it in carload lots over the Pennsylvania rails and leaves in the same manner. (R. 61, 108, 134.) Much of the storage is conducted under so-called "storage-in-transit" privileges, which are accorded to shippers under railroad tariffs filed with the Interstate Commerce Commission by the Pennsylvania Railroad. (R. 61-2, 135-6.)

Storage in transit privileges are utilized by shippers who buy commodities in bulk but who cannot immediately use or sell such commodities at one time or place. They therefore frequently desire to suspend the movement of their goods and store them at some convenient point. At a later date the movement can then be resumed to points and at times to suit the shippers' convenience. By virtue of the storage-in-transit privilege, a shipper pays only the rate for through shipment from point of origin to point of final destination instead of the larger sum of the two rates from originating to storage point and from storage point to destination.

As to the East Liberty warehouse, the sugar arrives

*Unless otherwise noted, all record references are to the record in No. 95.

consigned to the owner in care of Duquesne and is shipped out consigned to the owner under bills of lading marked "Accorded Transit Privileges at East Liberty." (R. 134, 170, 181.) The unloading and reloading of the sugar from and to railroad cars is done by Duquesne. (R. 61, 109, 134-5.)

The Pittsburgh warehouse is operated in a manner similar to that in effect at East Liberty. The freight handled at Pittsburgh, however, consists in general commodities. Ninety-five per cent of it arrives at the warehouse via Pennsylvania railroad tracks and most of it leaves in the same manner, although some is shipped out by truck. (R. 108, 136-7.) Carload freight is handled in the same manner as that prevailing at East Liberty as far as loading and unloading are concerned, but less-than-carload freight is unloaded from and loaded into railroad cars by the railroad company at its freight station (located in the building), and Duquesne picks it up and delivers it there.

In addition to the above, the services of Duquesne are utilized by the Pennsylvania Railroad in the reconditioning and disposing of unclaimed or damaged freight. These services are rendered on a commission basis; Duquesne receiving as its compensation its expenses plus ten per cent of the sales price.

THE ISSUES INVOLVED

The Railroad Retirement Act and the Railroad Unemployment Insurance Act each contains the following definition of the term "employer":

> "The term 'employer' means any carrier (as defined in subsection (m) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any

> equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, * * *." (U. S. C. Title 45, Section 228a (a), and U. S. C. Title 45, Section 351 (a).)

Subsection (m) referred to above (Subsection (b) in the Railroad Unemployment Insurance Act) reads thus:

> "The term 'carrier' means an express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act."

There is no question but that Duquesne is not a carrier subject to Part I of the Interstate Commerce Act. Likewise there is no question but that it is a corporation owned or controlled by such a carrier. The sole question in the case is that of whether the services performed by it are services "in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage or handling of property transported by railroad."

The Railroad Retirement Board has ruled that they are such services. In reaching this conclusion, it has applied a standard long ago formulated by it and used in many other cases to the effect that services reasonably closely related functionally or economically to the transportation, receipt, transfer in transit, storage or handling of property transported are to be considered as rendered in connection therewith, and hence within the purview of the Act.

The prime basis of Duquesne's attack on the Board's decision lies in its challenge of the propriety of the standard just stated. In the opinion of the Second Cir-

cuit, Duquesne's position is said to be that "the words of the statute, 'in connection with the transportation of property by railroad or the receipt, delivery, etc., of property transported by railroad' require that the acts, which the statute sets out as definitive, *be done by, or for, the carrier in discharge of the carrier's obligations, imposed upon it, by law or by contract, in connection with its transportation of the property, that is, while the carrier's obligations are in course of being performed*" (R. 477, emphasis supplied). As we understand this contention, it can mean only that the services contemplated are those which form a part of transportation itself as defined in the Interstate Commerce Act and which, if performed by a carrier, would form a part of its duties as such to the public. Thus, the first and probably the most important issue in the case is that of whether the statutory language should be interpreted as including services reasonably closely related to the transportation, storage, etc., of property transported by railroad, or whether, on the other hand, it was the intent of Congress to import into these statutes the technical distinctions of the Interstate Commerce Act and limit the services covered to those which, if performed by a carrier, would be subject to regulation under that statute.

The case presents a second issue which is as follows. Even if it be assumed that the Board has not interpreted the statutes correctly, that an intimate relationship with the transportation, storage, etc., of property is insufficient under the statutes, and that the Acts contemplate only those services which, if rendered by a carrier, would constitute transportation under the Interstate Commerce Act, do the services of Duquesne not even then fall within the statutory definition.

The third issue in the case involves the propriety of the Board's application of the statutes, as interpreted

by it, to the facts of these cases. This we understand to be identical with the issue ordinarily presented in all cases where administrative orders are being subjected to review, and depends for its solution upon the further question of whether there is in the record substantial evidence in support of the administrative decision reached.

OUTLINE AND SUMMARY OF ARGUMENT

In this brief, we will support the position that the decisions of the Retirement Board and that of the Court of Appeals for the District of Columbia should be sustained, because:

I. The Board's interpretation of the statutes is correct, for

A. It Is in Accord with the Statutory Language

The words of the statutes taken in their natural sense contemplate services related to, though not necessarily a part of transportation. They also indicate an intent to include services related to the storage, handling, transferring in transit, etc., of freight transported by railroad, and show on their face no intent to limit the coverage to cases where such services are rendered as a part of transportation itself, or while transportation is in progress.

B. It Is Not Inconsistent with the Legislative History of the Statutes

The legislative history is not employed here to resolve an ambiguity on the face of the statute but to create one which would not have appeared without reference to such history. While conflicting inferences may be drawn from the legislative history, there is more evidence of a

Congressional intent, conforming to the Board's interpretation than there is to the contrary.

C. It Conforms to and Will Accomplish the Purposes of the Statutes

If these acts are construed as including only carrier subsidiaries performing phases of the carrier's duty to the public, as defined in the Interstate Commerce Act, many operations which customarily form a part of the business of railroading may be entrusted to such subsidiaries for performance, thus evading the statutes and thwarting their purpose, which is to subject the railroad business as a whole to special regulation.

D. It Is Supported by a Long and Consistent Series of Administrative Decisions

Early in the history of the administration of these acts, the Board fixed upon the interpretation of the statutes which it applied in these cases and has consistently adhered to it. This administrative interpretation, while not controlling, is entitled to great weight.

II. The interpretation advocated by Duquesne would itself include that company in the statutory coverage.

If the statutes should be interpreted as contemplating only services which, if rendered by a carrier, would constitute "transportation," Duquesne is nevertheless covered, as the type of warehousing performed by it has been held to be a phase of transportation when performed by carriers for themselves.

III. The Board's decision on the facts is supported by substantial evidence and should not be disturbed.

Assuming the correctness of the Board's interpretation of the statutes, it had before it substantial evidence to support its decision. It appeared in the evidence that Duquesne is operating as an integral part of the transportation system of the Pennsylvania Railroad, and that its services constitute a valuable competitive aid to the business of that carrier and an economic service to its shippers.

ARGUMENT

I. The Board's Interpretation of the Statutes Is Correct

A. It Is in Accord With the Statutory Language

The language of these statutes on its face supports the interpretation which the Board has given it. The Circuit Court of Appeals for the Second Circuit has stated in its opinion that "the critical words 'in connection with the transportation of property and of property transported by railroad' are used to denote transit, and cover acts done only by or for the carrier while its obligations persist." This we understand to mean that the only services contemplated by the statutory definition must be themselves a part of the act of "transit" or "transportation," and must be performed at a time contemporaneous with the act of transportation.

We take direct issue with this conclusion. The actual language of the statute "in connection with the transportation * * * or the receipt, * * * transfer in transit, * * * storage, or handling of property transported by railroad" certainly does not indicate in and of itself that a service must constitute a phase of transit or transportation, or

that it must be contemporaneous with such transportation before it can be included. The natural meaning of the words "in connection with" is that of a relationship between two subjects which, while close, is not sufficiently close to amount to actual identity.

Further, there is nothing in the statutory language to indicate that the "services" and the "transportation" referred to are required to be performed at the same time. It is to be noted that the statutes refer to the various services mentioned as having been rendered to "property transported by railroad." As the Court of Appeals for the District of Columbia observed in its opinion, "the participle 'transported' is certainly in the past tense." The only way to make the language of the statute fit the contention of Duquesne and the opinion of the Second Circuit is to change it to read "property being transported." No such alteration of statutory language should be accomplished by judicial action unless clear justification is to be found for it elsewhere in the act or in its legislative history. No other language of the statute can be pointed to as affording such justification, and the legislative history will be considered below.

There is another conclusion, however, which may be drawn from the language of the statutes, but which the Second Circuit failed to consider. The Acts not only refer to services in connection with the transportation of property but specifically to services *in connection with* the receipt, transfer in transit, storage or handling of such property. Insofar as the specific situation of Duquesne is concerned, there can be no question but that it actually receives, transfers in transit, stores, and handles property. There is no question but that such property may be correctly designated as property "transported by railroad." Thus, even if Duquesne were held not to render any services in connection with transportation, it still

renders services in connection with the other functions mentioned, all within the literal and obvious meaning of the words of the statute. Duquesne, however, has attempted to avoid this conclusion by contending that the only accessorial services referred to by the statute are those which a carrier might be required to render as parts of its obligation to perform transportation. In short, it asserts that the words "receipt," "transfer in transit," "storage," and "handling," refer only to special phases of transportation, and are included in transportation itself. It is apparent that such a construction of these statutes reduces the words in question to mere surplusage. If the statutes intended to include only such services as form a part of transportation, that result would have been fully achieved by use of the phrase "services in connection with transportation." The fact that the statutes elaborated by including these other items is therefore in itself proof of the fact that something more than transportation alone or services in connection therewith was meant to be covered.

We conclude, therefore, that an examination of the language of the Acts supports the interpretation of the Board and the Court of Appeals for the District of Columbia, and that of the dissenting judge in the Second Circuit. Taking the words in their obvious and natural sense, they indicate that services were contemplated which were not a part of transportation but only rendered in connection therewith. They further indicate that the effect of the statutes is not limited to the inclusion of services in connection with transportation alone but extends to other services in connection with the receipt, transfer in transit, storage, and handling of railroad-transported property as well. The language of the Acts, therefore, is wholly consistent with the idea that services reasonably closely related to transportation or to the receipt, transfer in transit, storage, or handling of property transported by rail-

road are included. It lends no support to the contention that such services must be a part of transportation or "transit," or a phase of the carrier's duty as such, or that they must be performed while transportation is in progress.

B. The Board's Interpretation Is Not Inconsistent With the Legislative History of the Acts.

The argument by which Duquesne seeks to sustain its position is based on the legislative history of the statutes. This history is said to establish that the language of the statutes was not used in its normal sense but with a special or technical meaning not apparent on its face. Summarily stated, the argument appears to be somwhat as follows: The Railroad Unemployment Insurance Act and the Railroad Retirement Act contain identical definitions of the term "employer" and hence must be presumed to have the same coverage. This is not denied.*

It is further contended that the definition of the term "carrier" in the Railway Labor Act, an earlier statute, is so nearly the same as that of the term "employer" in the other Acts mentioned above as to lead to the conclusion that the one was adopted from the other. This, too, is conceded.** The final step in the argument is that the word

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* In fact, the report of the House Committee recommending the passage of the Railroad Unemployment Insurance Act stated: "The bill provides for a system of unemployment insurance for the same employees as are covered by the Railroad Retirement Act of 1937, and the support of such system of unemployment insurance through contributions collected from the same employers as are subject to the Railroad Retirement Act of 1937." (House Report No. 2668, 75th Cong., 3d Session.) This report was adopted verbatim by the Senate Committee in its Report No. 2164, 75th Cong., 3d Session.

** The Railway Labor Act provides: "The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad. * * *." (Section 1, First, U. S. C. Title 45, Section 151, First.)

"transportation" and the phrase "receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad" were borrowed almost verbatim from Section 1(3) of the Interstate Commerce Act, and hence are to be accorded only the weight given them in the application of that statute. This is said to be limited to the duties of a carrier, as such, to the public. Under this interpretation, the only purpose attributable to the Railway Labor Act and the statute now before the court would be that where carriers have entrusted to companies controlled by themselves the performance of some portion of their obligations to the public, then and then only would the statutory definition be applicable.

Such a conclusion certainly does not follow as a matter of law. It is, of course, recognized that statutes in *pari materia* are to be construed together and that the same or similar language in such statutes should normally be given the same interpretation. The Interstate Commerce Act and the various railroad labor statutes are not in *pari materia*, however. They do not form parts "of a homogeneous whole, of a common system." (*Louisiana vs. Mississippi*, 202 U. S. 1, 41.) Their subject matter is wholly different. The Interstate Commerce Act regulates the relationship between carriers and the public. Its original purpose was that of prohibiting discriminations. This purpose was subsequently expanded to include the ensuring of an adequate and sound transportation system, but in either case the provisions of the statute were directed to the obligations of the carriers to those using their facilities. The labor statutes, however, regulate the relationships between carriers and their employees. They seek to minimize labor disputes and improve employee morale. Their subject matter and aims are thus wholly different from those of the Interstate Commerce Act. It is true that

they constitute regulations of the business of railroading, but all such regulations are not to be considered as parts of one general regulatory system. This was made clear by the case of *United States vs. Colorado and North Western Railroad Company*, 157 Fed. 321, 330, where the court, in considering the relationship between the Interstate Commerce Act and other federal statutes designed to regulate phases of railroad activities, said:

> "The rule in *pari materia*, which counsel for the company invoke, the rule that the similar terms of statutes enacted for like purposes should receive like interpretations, is inapplicable to the Interstate Commerce Act and the safety appliance acts, because the provision of the latter relative to the question before us is plain and explicit, and a statute falls under that rule only when its terms are ambiguous or its significance is doubtful (Endlich on Interpretation of Statutes, Sec. 53, p. 67), and because the evils to be remedied, the objects to be accomplished, and the enactments requisite to attain them are radically different. It is true that each act was a regulation of interstate commerce, but so are the Sherman Anti-Trust Act, the Employers' Liability Act, the various acts regulating the inspection of steamboats, and the navigation of the inland rivers, lakes and bays, and many other acts, too numerous to mention or review. It does not follow from the facts that the Interstate Commerce Act was first passed, and that it regulates commerce among the states, and declares that its provisions shall apply to the members of a certain class of carriers engaged therein, that the Sherman Anti-Trust Act, the Safety Appliance Acts, and other subsequent acts regulating commerce apply to the members of that class only, in the face of the positive declarations of the later acts that they shall govern other parties and other branches of commerce. The subject of the first act was the contracts, the rates of transportation of articles of in-

terstate commerce; the subject of the Safety Appliance Acts was the construction of the vehicles, the cars, and engines which carry that commerce. The evils the former was passed to remedy were discrimination and favoritism in contracts and rates of carriage; the evils the latter was enacted to diminish were injuries to the employes of carriers by the use of dangerous cars and engines. The remedy for the mischiefs which induced the passage of the former act was equality of contracts and rates of transportation; the remedy for the evils at which the latter act was leveled was the equipment of cars and engines with automatic couplers. Neither in their subjects, in the mischiefs they were enacted to remove, in the remedies required, nor in the remedies provided, do these acts relate to similar matters, and the rule that the words or terms of acts in *pari materia* should have similar interpretations ought not to govern their construction."

Not only are the general purposes of the Interstate Commerce Act and the labor statutes wholly different, but the language here under consideration was used by them in entirely different contexts. The coverage of the Interstate Commerce Act is limited to carriers and their basic function, which is the furnishing of "transportation." Transportation is defined in Section 1(3) as including "all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." Section 1(4) of the Interstate Commerce Act makes it the duty *of carriers* to furnish such transportation. Thus, the concept of transportation was necessarily linked with that of the carrier's duty to the public.

The labor statutes, on the other hand, do not use the terms last above quoted in reference to the duties of carriers at all, but as a basis of fixing the coverage of carrier owned or controlled companies which were not covered by

the Interstate Commerce Act. It is apparent, therefore, that the purpose underlying the use of the language in question was wholly different in the labor acts from that which prompted its use in the Interstate Commerce Act and there is no logical basis for concluding that any technical or limited significance which has become attached to it in reference to carriers under the one act should be carried over and applied to carrier owned or controlled companies under the other.

If any such carrying over is to be established, it cannot accordingly be shown from the words of the statutes or from any legal principle of statutory construction because the statutes themselves are not in *pari materia*. Such a carrying over, if it was contemplated at all, must depend upon the legislative history of the statutes.

As noted above, the statutory language under consideration originated, as far as the labor statutes are concerned, with the Railway Labor Act. The Railway Labor Act was originally enacted in 1926 but the language in which we are interested was not incorporated into the statute until 1934, when extensive amendments were adopted. For the sake of reference it should be noted that the original definition of the term "carrier" in the Act of 1926 read as follows:

> "The term "carrier" includes any express company, sleeping car company, and any carrier by railroad, subject to the Interstate Commerce Act, including all floating equipment such as boats, barges, tugs, bridges and ferries; and other transportation facilities used by or operated in connection with any such carrier by railroad * * *."

Whether this language was intended to cover carrier subsidiaries is doubtful and this portion of the statute has never been judicially interpreted.

When the amendments of 1934 were proposed, Mr.

Joseph B. Eastman, at that time Federal Coordinator of Transportation under the Emergency Transportation Act of 1933, and also a member of the Interstate Commerce Commission, was instrumental in drafting the bill. Mr. Eastman appeared before the Interstate Commerce Committees of both Houses of Congress to explain and support it. The original bill (S. 3266, 73d Congress, 2d Session) contained the following proposed definition of the term "carrier":

> "The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, any company operating any equipment or facilities or furnishing any service included within the definition of the terms 'railroad' and 'transportation' as defined in the Interstate Commerce Act, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such carrier." (Hearings before the Committee on Interstate Commerce, U. S. Senate, 73d Cong., 2d Sess., S. 3266, p. 1.)

In explaining the meaning intended to be expressed by this language, Mr. Eastman made the following statement:

> "In the paragraph of Section 1 marked 'First,' there is a change in the present definition of the term 'carrier.' This change is intended to bring within the scope of the act operations which form an integral part of railroad transportation, but which are performed by companies which are not now subject to the Railway Labor Act. The most important illustration is found in the refrigerator-car companies, which own refrigerator cars operated by the railroads and perform certain functions connected with refrigeration service. Another illustration is found in the companies to which railroads have on occasion contracted out their maintenance work on equipment and even on way and structures.

The thought is that concerns which function in this way as an integral part of the railroad transportation system should be subject to the same duties and obligations with respect to labor controversies as the railroads themselves and as the express and sleeping-car companies. This object is attained by including in the definition of 'carrier' any company 'operating any equipment or facilities or furnishing any service included within the definition of the terms "railroad" and "transportation" as defined in the Interstate Commerce Act.' Perhaps a better way can be found of accomplishing the desired result, but it was thought that this language would serve the purpose.

"I may say that in reading that over last night I am not sure the language does cover all companies to which railroads on occasion have contracted out their maintenance work, and it perhaps should be examined rather carefully from that point of view.

"The Chairman. I am impressed with the fact that instead of defining the terms in this bill you have defined them as defined in some other bill.

"Mr. Eastman. Yes.

"The Chairman. That is rather poor legislation, isn't it, generally?

"Mr. Eastman. Well, the definitions in the Interstate Commerce Act are, of course, definitions of long standing.

"The Chairman. I am not objecting to it, I am wondering if they should not be written into this bill.

"Mr. Eastman. That might, perhaps, be better. Some paraphrasing would have to be done if that were done in that way.

"The Chairman. The very fact it would have to be done is a reason that it should be done. If you define the terms of one act by another act, everybody has to dig it up.

"Mr. Eastman. I am not sure the language as it stands does cover all that it is intended to cover. I shall be glad to give it further consideration, and

to indicate later any changes which I think ought to be made." (*Ibid.*, pp. 10-11.)

It is entirely clear from the above statement that Mr. Eastman intended to include companies performing certain services for railroads. Refrigerator car companies and companies performing maintenance service on railroad way and equipment were specifically mentioned. It is to be noted that maintenance of way and maintenance of equipment are not services mentioned by the Interstate Commerce Act as included in "transportation" or which carriers might be required to supply on demand to a passenger or shipper. While undoubtedly carriers owe to the public a general duty to maintain their property in a safe condition, no shipper may proceed beyond that point or demand that any specific act of maintenance should be performed for him. These services are not such that discrimination among shippers could arise. Thus, it is questionable whether maintenance of way and equipment services form parts of "transportation" as defined under the Interstate Commerce Act.* If they do not then the original definition proposed to be incorporated into the Railway Labor Act was intended to go farther in its coverage than did the Interstate Commerce Act, as shown by Mr. Eastman's express statements.

The consideration which Mr. Eastman suggested was evidently given, for at a later date, Mr. Eastman appeared again before the Senate Committee and proposed an amended definition. We quote further from the Committee proceedings:

"* * * the chairman has made a valid criticism of the definition of 'carrier' now in the bill, because it

*It is now being contended in two cases, Despatch Shops, Inc., vs. Railroad Retirement Board, which will be further noted below, that transportation under neither the Interstate Commerce Act, the Railroad Retirement Act, nor the Unemployment Insurance Act includes maintenance of equipment services.

requires reference to another act. I can also see difficulties in bringing in trucking operations and certain other operations performed for railroads by outside companies, because of possible conflicts with N. R. A. codes. It is difficult to know just where to draw the line. I am inclined to believe that for the present it would be well not to go beyond carriers and their subsidiaries engaged in transportation. So changed, the definition would read:

"'The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad.'

"That I may say, is some of the language in the Interstate Commerce Act.

"The Chairman. Is there some difference, however? Isn't this reference here to parent, subsidiary, and affiliated, new?

"Mr. Eastman. Yes. I am confining this now to the railroad subsidiaries because of the possible conflict with N. R. A. codes if we get into the outside field." (Pp. 145-146, Hearings before the Committee on Interstate Commerce, U. S. Senate, *supra.*)

Mr. Eastman also appeared before the Interstate Commerce Committee of the House of Representatives, and made the following additional statement as to the meaning of the amended definition which had been submitted by him to the Senate. After quoting the language of the definition, he said:

"'Now, summing that up, it includes with those carriers subject to the provisions of the Interstate

> Commerce Act, *i.e.*, all railroad companies and express companies, and all companies which are directly or indirectly owned or controlled by the railroads and which perform service or furnish facilities in connection with transportation service performed by the railroads, and the definition includes words descriptive of such transportation service which are taken from the provisions of the Interstate Commerce Act." (P. 17, Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 73d Cong., 2d Session, on H. R. 7650.)

And further:

> "The definition in this bill, H. R. 9689, makes it clear that all transportation service, as defined by the Interstate Commerce Act, whether performed directly by a railroad or indirectly by a subsidiary company, shall be subject to the provisions of the Railway Labor Act."

The first of these two statements is in part a paraphrase of the statutory language and to that extent is not particularly helpful in determining the intent. The second quotation appears to lend some support to the contention that only "transportation service" was intended to be covered by the statute. It is true that Mr. Eastman stated that "all transportation service" was included. He did not state, however, that *only such services* were covered. This fact, when taken in connection with the further intent expressed by him to the Senate Committee to include contractors performing services whose status under the Interstate Commerce Act is doubtful, leads to the conclusion that his statement was intended by him as being illustrative and not as expressing the maximum coverage possible under the statute.

Only slight modifications were made in the proposed definition last above quoted before the passage of the

Railway Labor Act. The final definition of the enacted statute reads as follows:

> "The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad.". (U. S. C. Title 45, Section 151, First.)

The only noteworthy feature of the final definition is that it expressly excluded "trucking service" from the coverage provided. This leads to the conclusion that such service would have been included in the general definition had this exclusive language not been used. It has, however, been held that in general, trucking service is not a transportation service under the provisions of Section 1(3) of the Interstate Commerce Act. See *Interstate Commerce Commission vs. Detroit, Grand Haven and Milwaukee Railway Company*, 167 U. S. 633. If the Railway Labor Act was intended to include only such services as were embraced within the Interstate Commerce Act, the specific exclusion of trucking service is difficult to understand.

Insofar as the Railway Labor Act is concerned, this concludes the legislative history in relation to its employer coverage. At the time when this statute was before Congress, however, there were also under consideration several bills proposing the establishment of a retirement system for railroad employees. The consideration of these bills ultimately led to the enactment of the Railroad Retirement Acts of 1934 and 1935, both of which contained

definitions of employers covered which were substantially the same as the definition of a "carrier" set forth in the Railway Labor Act.* Insofar as we have been able to ascertain from the Committee hearings, these definitions were adopted without any discussion as to the significance of the language used.

When the Railroad Retirement Act of 1937 came before the Congress, however, the matter of the scope of the coverage of the Act as to employers was given consideration. Mr. George M. Harrison, in explaining the terms of the bill before the House Committee on Interstate Commerce, stated as follows:

> "Now Section 1 might be referred to as the scope of the legislation. Section 1 makes the bill applicable to those that are defined in that section as employers: Now the employers defined in Section 1 are express companies, sleeping-car company, or carrier by railroad that are subject to part I of the Interstate Commerce Act, and in addition thereto it is proposed to include as employers any company which may be directly or indirectly owned or controlled by the express company, the sleeping-car company, or railway company, or under common control by one or more of such companies, when those companies are engaged in the business of transporting passengers or property for the rail-

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* "The term 'carrier' includes any express company, sleeping-car company, carrier by railroad subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation of passengers or property or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad." (Sec. 1a, Act of 1934, 48 Stat. 1283.)

"The term 'carrier' means any express company, sleeping-car company or carrier by railroad subject to the Interstate Commerce Act, and any company owned or controlled thereby or under common control therewith, and which operates any equipment or facilities or performs any services (other than trucking service) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage or handling of property transported by railroad." (Sec. 1a, Act of 1935, 49 Stat. 967.)

road or other service that is a part of railway transportation, such as grain elevators, private car lines, refrigerator car companies, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of these previously identified employers which are, express companies, sleeping-car companies, or carriers by railroad." (Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 75th Cong., 1st Sess., on H. R. 6956, page 17.)

The scope of the bill was further stated by this witness in the course of the Senate Committee Hearings, as follows:

"* * * the bill will embrace in its scope all common carriers by railroad, express, or Pullman companies that are subject to part I of the Interstate Commerce Act, and in addition thereto such companies as may be owned, in whole or in part, or in or under the control of one or more of the railroads, express, or Pullman companies when and if such companies are engaged in the transportation of passengers or property by railroad." (Hearings before the Committee on Interstate Commerce, U. S. Senate, 75th Cong. 1st Session on S. 2390, pages 17-18.)

The Senate Committee Report on the bill contains the following significant summary as to the scope of the proposed measure:

"The present act embraces within its scope 'any company which may be directly or indirectly owned (by a carrier) or controlled thereby or under common control therewith, and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, trans-

fer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of and operating the business of any such "carrier".' This language has been clarified to make it clear that coverage extends to a company which is owned or controlled in common by several companies. Exclusions have been extended to casual service and the casual operation of equipment or facilities. In addition to trucking service, it is intended to exclude employees of a contractor who may, for example, be occasionally employed by a 'carrier' to repair a depot or build a bridge. Contractors, other than those which perform casual service, would not be excluded, irrespective of whether control be legal or *de facto*. *De facto* control may be exercised not only by direct ownership of stock, but by means of agreements, licenses, and other devices which insure that the operation of the company is conducted in the interests of the carrier.

"By these changes there are brought within the scope of the act substantially all those organizations which are *intimately related to the transportation of passengers or property by railroad in the United States.*" (Report of Senate Committee on Interstate Commerce No. 697, 75th Cong. 1st Sess., page 7.) (Emphasis supplied.)

Two points are noteworthy in connection with this report. In the first place, words were inserted which, as the Committee stated, were intended to exclude companies employed by carriers "to repair a depot or build a bridge." Certainly such operations form no part of transportation under the Interstate Commerce Act, and if it had been the underlying purpose of Congress to limit the coverage of the new statute to such "transportation," the exclusion referred to would have been unnecessary.

Equally significant is the committee's statement that

it was the intent of the Act to cover those organizations "intimately related" to transportation. This we understand to be substantially the criterion which the Railroad Retirement Board has adopted but which is so vigorously challenged in these cases.

When the Railroad Unemployment Insurance Act was passed, it was as above noted, the expressed intent of Congress to cover exactly the same employers as were covered by the Retirement Act. Naturally enough, therefore, the legislative history of the Unemployment Insurance Act sheds no further light on the question of employer coverage.

Summary. Where the language of a statute is ambiguous, it is well established that resort may be had to its legislative history as an aid to interpretation. If the legislative intent is made apparent from the history, it will frequently be conclusive.

In these cases, however, the language of the statutes themselves is clear. The only doubt in regard to the interpretation arises from the contention which has been made that the definitions and distinctions of the Interstate Commerce Act are to be imported into the labor statutes. This contention is based on the legislative history which has thus been used to create rather than resolve an ambiguity. This fact alone is sufficient to justify the Court in refusing to consider the legislative history at all.

In addition to the above, however, we have pointed out that the history of these statutes does not establish the existence of any intent to include only such services as form parts of transportation subject to the Interstate Commerce Act. References to maintenance and trucking services and to contractors who may repair a depot or build a bridge point to a contrary conclusion, the status

of all such services as "transportation" under the Interstate Commerce Act being certainly questionable. Further, in this connection, we find in the language of the report of the Senate Committee considering the Retirement Act a statement to the effect that it was the purpose of Congress to bring into the purview of the statute those companies performing services "intimately related to * * * transportation." This language is certainly inconsistent with any thought that Congress meant to limit the established coverage of these statutes to companies actually engaged in transportation.

Considered from a point of view as favorable as possible to the position taken by Duquesne, the most that can be said for the legislative history is that conflicting conclusions may be drawn from it. It hence affords an insufficient basis for determining Congressional intent, even were the expressions of that intent in the statutes themselves ambiguous. Where there is in fact no ambiguity in the language of the statutes, it follows even more clearly that the legislative history affords no foundation for Duquesne's contention.

C. The Board's Interpretation Conforms to and Will Accomplish the Purpose of the Statutes

As we have seen, the railway labor statutes employ substantially the same definitions of the terms "carrier" or "employer." This identity of definition is natural when we consider the purpose common to all of preventing the deterioration or disruption of commerce due to labor unrest resulting either from unsettled disputes with employers or from the failure of the industry to provide a means for meeting the problems of superannuation and unemployment.

The employer coverage provisions have a definite

relationship to this purpose, a relationship revealed by experience under earlier statutes. As above noted, the Railway Labor Act of 1934 was an extensive amendment of the earlier Railway Labor Act of 1926, which, in turn, supplanted the Transportation Act of 1920.

The Railway Labor Act of 1926 and the Transportation Act both included carriers in their employer coverage, but neither purported to cover carrier subsidiaries rendering services in connection with transportation. This omission gave rise to serious difficulties in connection with the administration of these statutes. A substantial number of the carriers created subsidiary corporations which they controlled by one means or another, turned over to these corporations various services theretofore carried on by the carriers themselves, and asserted that these new companies and their employees were no longer subject to the regulatory statutes operating in the railroad field.

The Transportation Act was administered by a body known as the United States Railroad Labor Board. Early in the history of that tribunal it had occasion to consider the problem presented by these subsidiary corporations in the case of *Railway Employes' Department, A. F. of L., vs. Indiana Harbor Belt Railroad Co.*, 3 U. S. R. L. B. 332. In its opinion, the Board roundly condemned this whole procedure, saying:

> "The object of the transportation act was to prevent interruption to traffic, growing out of disputes between carriers and their employees. Such controversies had for years periodically harassed the public, blocked commerce, stagnated business, destroyed property values, and visited great inconvenience and suffering upon millions of people. At a time when our country was in no condition to undergo further repetitions of such unfortunate experiences and when they were possible on a

much larger scale than ever before, Congress endeavored to provide a method for the adjustment of railway labor troubles. In the transportation act, 1920, the Government enjoins upon all carriers, and their officers, employees, and agents, the duty to 'exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier, growing out of any dispute between the carrier and the employees or subordinate officials thereof.' Elaborate provisions are made in this act for conferences between the parties for the settlement of disputes, and, in the event of a failure to agree, for the hearing and decision of them by adjustment boards and by the Railroad Labor Board.

"When Congress in this act speaks of railroad employees it undoubtedly contemplated those engaged in the customary work directly contributory to the operation of the railroads. It is absurd to say that carriers and their employees would not be permitted to interrupt commerce by labor controversies unless the operation of the roads was turned over to contractors, in which event the so-called contractors and the railway workers might engage in industrial warfare ad libitum." (Page 337.)

The Railroad Labor Board had no power to enforce its decisions (*Pennsylvania R. Co. vs. U. S. R. L. B.*, 261 U. S. 72; *Pennsylvania R. System, etc., vs Pennsylvania R. Co.*, 267 U. S. 203), and its rulings as to subsidiary companies were generally ignored by the carriers. In fact, only about six weeks after the decision in the Indiana Harbor Belt case, the Board announced that it had facts in its possession indicating that its orders had been violated by 25 carriers through the device of "contracting out" railroad work, and cited these carriers to appear before it in relation to a threatened strike of railroad shopmen. (3 U. S. R. L. B. 1137-1139.)

The efforts of the Labor Board to adjust the various matters in dispute between the railroad companies and the shop men were unsuccessful and the strike which ensued was the most serious ever to affect the railroad industry. Some 400,000 men left their work. It is generally agreed that one of the major contributing causes was the practice above discussed of contracting out railroad shop work. See Wolf, "Railroad Labor Board," (published by the University of Chicago Press) pages 231-233 and 234; the resolution of the United States Railroad Labor Board above referred to, 3 U. S. R. L. B. 1137, 1138; and a contemporary editorial in the "Railway Age," trade journal of the railroad industry, Vol. 53, page 550.

All of these facts were certainly within the contemplation of Congress when it was proposed to that body that the Transportation Act be repealed and the Railway Labor Act enacted in its place. The first such proposal was made by the railroad employees and took the form of a bill known as the Howell-Barkley Bill. This measure sought to cover carrier subsidiaries by the inclusion of the following language in the definition of "carriers" who were to be subject to its provisions:

> "* * * including all bureaus, associations, committees and institutions of whatever kind or character maintained or supported by or existing in furtherance of the interest of carriers." (Vol. 65, Congressional Record, page 7880.)

Considerable opposition to the Howell-Barkley Bill developed in Congress, and it was never passed. In its place, however, another bill was presented which was a compromise measure accepted by both the railroad companies and their employees, and introduced under their joint sponsorship. This bill, which omitted the language

above quoted, was passed, and became the Railway Labor Act of 1926.

The problem of contracting out work to non-carrier companies was therefore not solved by the Railway Labor Act, but appears to have continued as a live issue.

It is clear that the amendments of 1934 sought to provide a solution for this difficulty by the introduction of the carrier subsidiary provisions. These provisions in the Railway Labor Act and the later statutes should therefore be interpreted in accordance with the need which gave rise to them.

In the case of *National Labor Relations Board vs. Hearst Publications, Inc.*, 322 U. S. 111, the court was faced with the contention that certain persons were not employees but independent contractors under the rules of the common law, and hence should be held similarly to be independent contractors under the National Labor Relations Act. The court declined to adopt this reasoning, holding that the existence of an employment relationship under the statute was to be determined from the situation of the parties in reference to the purposes of the Act, and the evils which it was designed to eliminate, rather than distinctions of the common law devised to meet a wholly different problem. The same reasoning is applicable here where the distinctions of the Interstate Commerce Act are sought to be introduced into the labor statutes.

If the Court should sustain the position of Duquesne and thereby peg the definitions of the Railway Labor Act, the Railroad Retirement Act, the Carriers' Taxing Act and the Railroad Unemployment Insurance Act to those of the Interstate Commerce Act, and specifically to the concept of "transportation" as embodied in that statute, we anticipate that other efforts will be made to establish that various phases of the business of railroad-

ing can be divorced from the coverage of these statutes by the simple device of entrusting their performance to subsidiary corporations which can then be asserted to perform no services within the definition of transportation in the Interstate Commerce Act. That this is no idle fear on our part is evidenced by the fact that other cases are now pending where this result is sought. Two of these cases, entitled *Despatch Shops, Inc., vs. Railroad Retirement Board*, are now before the United States Court of Appeals for the Second Circuit and the United States Court of Appeals for the District of Columbia. Both involve the question of whether a carrier subsidiary operating a railroad shop which maintains equipment and manufactures parts and cars for the carrier, performs a service in connection with transportation. Another case, Universal Carloading and Distributing Company vs. Pedrick, is now pending in the United States District Court for the Southern District of New York. It arose under the Carriers Taxing Act (which includes the same definition of the term "employer"), and involves the question of whether a company which performs the same function as a railroad with reference to less-than-carload freight with the exception of the actual haulage, is performing a service in connection with transportation.

How far the tendency expressed in these cases will proceed, we cannot say. We do know, that the business of railroading is such that it depends for its operation on the correlation of many functions widely separated in space and kind. Many of these have been incorporated into the carrier's operations for reasons of economy and efficiency and not because they are actually required in order to comply with the carrier's common law and statutory duties as such. Wherever such a situation exists, there is room for the subsidiary corporation and opportunity for the claim being made that no transportation

is performed by such a company, and that it is hence outside the scope of the labor statutes.

The interpretation of these statutes sought by Duquesne will obviously prescribe limits for the Railroad Retirement Act and the Railroad Unemployment Insurance Act less extensive than that of the actual business of railroading as habitually carried on by carriers and their subsidiaries. How much less extensive these limits might be held to be is a matter of conjecture. No authoritative decision has ever been made regarding the status under the Interstate Commerce Act of many railroad services. There has never been any occasion for such a determination, as these services have not impinged upon the relation between carriers and the public sufficiently to require regulation at the hands of the Interstate Commerce Commission. As to all such, the contentions of Duquesne offer the device of the subsidiary corporation as a means of avoiding the provisions of the labor statutes. No statutory provision should be interpreted in such manner as to thwart any portion of its purpose by encouraging evasion.

On the other hand, the interpretation made of these acts by the Board and by the Court of Appeals for the District of Columbia eliminates this possibility and effectuates the statutory purpose. The Board has held that those services are included within the scope of the acts which are "an integral part of or are closely related to the rail transportation system of a carrier." The Court of Appeals for the District of Columbia has interpreted this standard of administration of the acts as being consistent with the policy of Congress "to cover the business of railroading as it is actually carried on." These interpretations would eliminate carrier owned companies acquired merely for investment purposes whose functions are not expected to contribute to the efficiency

or prosperity of railroad operations. They would include those which are intended to supplement and support the primary business of the carriers.

We conclude, therefore, that the Board's interpretation as sanctioned by the Court of Appeals for the District of Columbia more clearly effectuates the Congressional purpose than does that adopted by the Second Circuit. It does not afford the opportunity for evasion through the artificial agency of subsidiary corporations and it includes in one social security system all those intimately related to the railroad business. This we consider to have been the purpose of Congress.

D. The Board's Interpretation Is Supported by a Long and Consistent Series of Administrative Decisions

The question of the weight to be given by the courts to the Retirement Board's interpretation of these statutes has been the source of sharp disagreement in the opinions of the Courts of Appeals. Much of this disagreement has been occasioned by what we believe to be a misconception of our own and the Board's position. We have not contended and do not understand that the Board has asserted that its interpretation is sacrosanct and immune from reexamination at the hands of the courts. We do contend, however, that where any tribunal has been entrusted with the administration of a statute, where in the course of that administration the tribunal is required to interpret the statute, and where the statute has received at the hands of such tribunal a consistent interpretation over a period of years, that interpretation is entitled to great weight and should not be disturbed unless clearly erroneous. This principle has been so definitely established in the decisions of this Court that lengthy citations of authority are not required to establish it. *Billings vs.*

Truesdell, 321 U. S. 542, 552; *United States vs. American Trucking Association*, 310 U. S. 534, 549; *Norwegian Nitrogen Products Company vs. United States*, 288 U. S. 294, 315.

The present Railroad Retirement Act was enacted in 1937, and almost immediately thereafter, the Retirement Board was faced with the necessity of interpreting and applying the statutory definition of employers. The unique nature of the problem was discussed in the Board's annual report for the year 1938 as follows:

> "The concept of the national system of railroad transportation, which was largely crystalized in the period following the war-time assumption of Federal control, is the joint product of a century of physical and mechanical development and a half century of Federal regulation. Despite the deep historical roots of the concept, railroad retirement insurance legislation for the first time brought about the necessity for ascertaining and identifying its content concretely and with the precision that the term insurance necessarily implies. Regulation in the interest of shippers, the policing of safety legislation, and, even more, the assumption of Federal control, all served to give rise to the concept and to give it content. However, the content derived from these sources is largely embodied in the somewhat narrower conception of 'a common carrier by railroad engaged in interstate commerce.' Nevertheless, for certain regulatory purposes, such as, for example, the acquisition of information and the control of securities issues provided for in sections 20 and 20a of the Interstate Commerce Act, it has long been recognized that the term 'common carrier by railroad engaged in interstate commerce' is not wholly adequate to cover the field.
>
> "The inadequacy of the term was more strikingly revealed in the regulation of employer-employee

> relationships which culminated in the Railway Labor Act. It became apparent that if employer obligations were attributed merely to those entities which are responsible for the discharge of the obligations to the public for carriage, that is, common carriers, it might well prove convenient for employers to avoid the obligations in substantial parts of the transportation industry by providing for the performance of closely related services through entities legally separate yet effectively controlled. Accordingly, the introduction into railway labor legislation of language descriptive of controlled companies performing services related to transportation was a natural step in the historical process by which the conception of the national system of railroad transportation was given definitive expression." (pp. 134-135.)

Thereafter, the Board listed a number of services which it considered to be included, or excluded, as the case might be, and said:

> "Storage of property received for a carrier and awaiting transportation by the carrier, or awaiting delivery by the carrier following transportation, is an employer service; but performance of the usual commercial storage and warehouse business is not." (p. 142.)

Duquesne has made much of this statement in the course of its arguments in the lower courts, and has asserted that it constitutes a holding to the effect that Duquesne is not covered by the Act. It is to be noted that the Board merely stated that a company performing a "*usual commercial* storage and warehouse business" is not included. By this we understand the Board to refer to those companies performing storage and warehouse services for the public at large. The evidence in this case, however, reveals that Duquesne is a captive enterprise in a functional as well as a corporate sense, and

that its relations with the public are limited for the most part to Pennsylvania Railroad shippers who use its services as an adjunct to the act of shipment. We cannot see, therefore, how the Board by such a statement, can be held to have foreclosed itself from deciding that Duquesne is subject to these statutes.

After consideration of the whole problem of employer coverage, the Board, in its regulations issued during the year 1938, fixed upon a standard of decision to govern it in determining whether the services of a given subsidiary company were or were not rendered in connection with transportation, etc. This standard was stated in 20 Code Fed. Reg. 202.7, as follows:

> "The service rendered or the operation of equipment or facilities by persons or companies owned or controlled or under common control with a carrier is in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, if such service or operation is reasonably directly related, functionally or economically, to the performance of obligations which a company or person or companies or persons have undertaken as common carriers by railroad, or to the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad." (Secs. 1, 10, 50 Stat. 307, 314; 45 U. S. C. Sup. III, 228a, 228j.)

The position so stated in its regulations has been consistently followed by the Board in its decisions. Probably its leading case on this point is that of *Lenoir Car Works*, Railroad Retirement Board Law Bulletin, No. 2, page 323, which was decided early in the year 1939. The respondent in that case is a subsidiary of the Southern Railway and operates a large shop wherein the cars of the various rail-

roads going to make up the Southern Railway System are repaired, and where car parts are manufactured. The contention was made that the company was exempt from the provisions of the Act because "the Railroad Retirement Act was designed to apply only to those carrier-controlled companies engaged in operations which are 'parts of transportation'," which is substantially the same contention that Duquesne is making here. The Board's examiner rejected this argument and his report was adopted by the Board in the absence of exceptions. The case is commented on in the Board's Annual Report for 1939, as follows:

> "An important conclusion of law in the examiner's report stated:
>
> "'The operation of equipment or facilities or the performance of a service in connection with the transportation of passengers or property by railroad within the meaning of Section 1(a) of the Railroad Retirement Act is not restricted to operations or services which constitute transportation or practically transportation.'
>
> "Another notable conclusion was that the operation of equipment or facilities or the performance of a service in connection with the transportation of passengers or property by railroad within the meaning of Section 1(a) of the acts, although inclusive of transportation services covered by Section 1(3) of the Interstate Commerce Act, is not limited to such transportation services." (Page 170.)

The basic principles stated in the regulation above quoted and amplified in the *Lenoir* opinion have been followed by the Board in numerous cases thereafter. Certain of these involve carrier owned or controlled warehouse companies performing storage and transit services similar to those of Duquesne. *Baltimore Fidelity Warehouse Company, Railroad Retirement Board Law Bulletin No. 2,*

532; *B. R. & P. Warehouse, Inc., id.* 527; *Terminal Storage Company of Washington, id.* 524; *Lackawanna Terminal Warehouses, Inc., id.* 537.

The same general principles have been applied to other carrier subsidiaries as will be seen from the following cases which have been selected as illustrative. These cases cover telegraph companies (*Great Northwestern Telegraph Company of Canada, Railroad Retirement Board Law Bulletin No. 2,* 385); tie preserving companies (*Santa Fe Tie and Lumber Company, id.* 276); hospital associations (*Chesapeake & Ohio Railway Employees Hospital Association, id.* 211); railroad office building companies (*Southern Pacific Building Company, id.* 371); railroad equipment manufacturing, repair and maintenance companies. (*Oneida Machinery Company, id.* 322); water supply companies (*Beaver Creek Water Company, id.* 550; *Union Pacific Water Company, id.* 546); railroad dining car companies and eating houses (*Fred Harvey Dining Car Operations, Fred Harvey,* and *Fred Harvey Service, Inc., id.* 135, 138 and 140); barge companies (*Kelley's Creek Barge Line, Inc., id.* 13); railroad land companies (*Rock Island Improvement Company, id.* 266); dock and terminal companies (*Alleuez Bay Dock Co., id.* 168, *Long Dock Co., id.* 169). Throughout all of these cases the Board has consistently applied the interpretation of the statutory definition noted above, and has by the use thereof developed a consistent and workable standard for the application of the statutes.

There can accordingly be no question as to the existence of a settled interpretation made by the Board. This interpretation was arrived at only after careful consideration of the nature of the problem before it. Once decided upon, it has been applied consistently throughout the years since its formulation. According to principles of law long settled by the decisions of this court, therefore, the Board's

interpretation is entitled to such weight at the hands of the courts that it will not be set aside unless clearly shown to be contrary to the language of the statute. This we submit has not been established in this case.

Summary as to Statutory Interpretation

We have pointed out above that the interpretation of these acts reached by the Retirement Board is sound and should be sustained, *first*, because it is in accord with and gives full effect to the words of the statutes taken in their natural sense; *second*, because no technical or restricted meaning may be attached to this language by reference to a legislative history which is replete with circumstances indicating that Congress intended to use the language in question in a sense much broader than the alleged restrictions would permit; *third*, because the interpretation advocated by Duquesne will introduce distinctions into the statutes which are foreign to their basic purposes and which will permit evasions as to substantial portions of the ordinary business of railroading, and *fourth*, because the Board's interpretation represents a settled decision as to the meaning of these acts, which decision has been consistently followed.

II. The Interpretation Advocated by Duquesne Would Itself Include That Company in the Statutory Coverage

Up to this point in the brief, we have supported the interpretation made of these statutes by the Railroad Retirement Board. At this point, however, we wish to analyze the argument advanced by Duquesne for the purpose of pointing out that, even under its own contentions, carried to their logical conclusions, that company still falls within the statutory coverage.

As noted above, Duquesne's position depends primarily on the legislative history of the statutes. By reference to certain items therein, it has reached the conclusion that the only services contemplated by these acts are those embraced within the concept of "transportation," as developed in the course of the enactment and administration of the Interstate Commerce Act. Certainly there is nothing in the legislative history or elsewhere which can be pointed to as indicating any intent to establish in the labor statutes a definition of transportation or services in connection therewith more restricted than that of the Interstate Commerce Act.

Inasmuch as "transportation" under the Interstate Commerce Act is considered as a function of a carrier, and in the labor statutes the expression "services in connection with transportation, etc.," is used in reference to subsidiary companies which are not carriers, the only possible logical conclusion of Duquesne's argument is that the labor statutes were intended to include carrier subsidiaries performing services which would constitute transportation under the Interstate Commerce Act *if performed by a carrier.*

The difficulty inherent in the argument is, however, that there is authority for the proposition that warehousing, while not a necessary carrier function, constitutes a phase of transportation if a carrier performs it.

In the case of *American Warehousemen's Association vs. Inland Waterways Corporation*, 188 I. C. C. 13, the Interstate Commerce Commission had before it the question of the legality of certain storage-in-transit operations of a carrier which were alleged to be discriminatory. The jurisdiction of the Commission was challenged on the ground that the operations in question were not a phase of "transportation." The Commission held that it had jurisdiction, saying:

> "It is true that there are certain services, such as warehousing, which, on the theory of the common law, are not common-carrier services and which, in the absence of discrimination, common carriers can not be required to render. Thus in numerous cases we have held that beyond such time as may be required to afford shippers a reasonable opportunity to remove shipments tendered for delivery, storage is no part of the duty of a common carrier; that a carrier is justified, therefore, in imposing such charges for storage as would promote removal of freight from its equipment or premises; and that to that end, it may properly make such charges higher than the actual value of the storage service. *Dakota Monument Co. vs. Director General*, 59 I. C. C. 101; *Plymouth Coal Co. vs. D., L. & W. R. R. Co.*, 36 I. C. C. 76.
>
> "It is well recognized, however, that there are many things which a carrier may voluntarily do which it can not be required to do, and if it holds itself out to and does render storage service in connection with shipments subject to our jurisdiction such service, although not a service which it could be required to perform, is nevertheless included in the term 'transportation' as defined by the Interstate Commerce Act." (Pp. 15-16.)

The same conclusion was stated in the case of *Storage at New London and Thamesville, Conn.*, 190 I. C. C. 213, where it was stated:

> "Protestants take the position that the proposed storage in transit is not a transportation service. It is well settled that storage in transit comes within the meaning of the term 'transportation' as defined in Section 1 of the Interstate Commerce Act." (P. 214.)

This court reached a similar conclusion in the case of *Cleveland, C. C. & St. L. R. Co. vs. Dettlebach*, 239 U. S. 588. The case involved the liability of a carrier for a loss

of goods suffered while in its hands as a warehouseman. The carrier defended on the ground that its liability was limited by a stipulation in the bill of lading by which the shipper had agreed to a small valuation as consideration for securing a reduced rate. The Commission had approved this practice, acting under the Interstate Commerce Act, and its authority so to do was questioned. The court held that the stipulation was valid, and that the transportation subjected to regulation by the Interstate Commerce Act included the service in question, saying:

> "From this and other provisions of the Hepburn Act it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that, so far as interstate carriers by rail were concerned, the entire body of such services should be included together under the single term 'transportation,' and subjected to the provisions of the act respecting reasonable rates and the like." (P. 594.)

It follows from these authorities that if Duquesne's present operations were actually being conducted by the Pennsylvania Railroad, there is strong reason to believe that they would be considered as transportation subject to regulation at the hands of the Interstate Commerce Commission. This being true, it follows that even under Duquesne's restricted interpretation of the labor acts, it still would be subject to their provisions.

III. The Board's Decision on the Facts Is Supported by Substantial Evidence and Should Not Be Disturbed

In the prior sections of this brief, we have been concerned with the interpretation of the statutes and the propriety of the standard of decision employed by the Board in this case. If this standard is sustained as legally sound, there remains for consideration the question of whether the actual decision reached by the Board constituted a proper application of it. According to established principles of judicial review, the Board's decision should be sustained if supported by substantial evidence. This principle is prescribed by the Railroad Unemployment Insurance Act, which provides that "the findings of the Board as to the facts, if supported by evidence, and in the absence of fraud, shall be conclusive." (U. S. C. Title 45, Sec. 358(f).)*

While the Railroad Retirement Act does not contain specific language limiting the scope of review of decisions made by the Board thereunder, the same general rule has been consistently applied to it as well. See *South vs. Railroad Retirement Board*, 131 F. (2d) 748, *certiorari* denied, 317 U. S. 701; *Fillers vs. Railroad Retirement Board*, 132 F. (2d) 636; *Gardner vs. Railroad Retirement Board*, 57 F. Supp. 322, affirmed by the Circuit Court of Appeals for the 5th Circuit in April, 1945. The opinion of the Circuit Court is not officially reported, but may be found in C. C. H. Railroad Unemployment Insurance Service, Par. 9465.

There was ample evidence before the Board to establish the existence of a relationship between the services of Duquesne and transportation as conducted by its parent company. The mere fact that Duquesne is owned by a

* It should be noted that Paragraph (f) refers specifically to actions brought by employee claimants or their labor union representatives, but the provisions of the paragraph are elsewhere in the act made applicable to actions of this kind. (Section 358 (c).)

railroad, that its principal officers are officers of the railroad, that its buildings are owned by and leased from the railroad, and that the latter also occupies space therein as freight stations, all affords presumptive evidence of a functional relationship between their operations.

The connection between railroad haulage and the type of warehousing performed by railroads or their subsidiaries has been recognized by this court in the case of *Baltimore & Ohio R. Co. vs. U. S.*, 305 U. S. 507, wherein the court discussed the general situation as follows:

> "Neither the complaints of the competitors of the carriers in the warehousing business nor the terms of the Commission's order are directed at the involuntary storage of goods incidental to transportation. This is the period before or after shipment during which goods occupy cars or floors without any charge above the strictly transportation rate. The warehousing practices complained of are those in connection with accessorial services of the carriers, accurately designated commercial warehousing. Examples of such services are the storage and other warehousing services furnished by the carriers or their affiliates or subsidiaries, to enable shippers to hold and handle their commodities beyond the time allowed by transportation rates and in ways not required by rail movement itself. All of the carriers 'now generally store freight on piers owned or leased by them and in warehouses operated by affiliated or subsidiary companies.' This business is carried on in various ways. Some carriers lease space to shippers for warehousing; others have aided in financing structures on their property in which they lease space from their own subsidiaries; and still others own directly the buildings and lease them to subsidiaries for warehouse operations. In all cases the carriers exercise sufficient control over the warehouse facilities to make them subservient to the competitive needs of the carriers. Their entrance into

warehousing was brought about by a desire to induce shippers to use particular rail facilities and as first one and then the other of the carriers gained traffic by their warehouse conveniences, it seemed necessary for their competitors to equip themselves with similar advantages. Obviously a shipper, who can secure transportation, storage, handling and insurance together from a carrier and its affiliates for an aggregate cost which is less than the sum for which he can secure the various services when purchased separately from carriers and non-affiliated enterprises, will deal with those offering the best terms. The storage largely determines the transportation route. To get the rail transportation of large shippers, the carriers sought them out and offered warehousing services and space below the rates of private warehousemen and below the cost to the carriers of the services rendered. It was not only a contest between carriers and private warehousemen but also between the carriers themselves. Traffic departments of the railroads became solicitors for warehousing business. Favored shippers were rented space by the carriers below compensatory figures." (pp. 516-517.)

No contention is made here that the facilities of Duquesne are now being used as a basis of illegal reductions or preferences in freight rates, but the close connection with railroad business which made these practices possible in the past, still exists. There can be no question as to the economic advantage to the shipper of storage-in-transit privileges for he thereby secures the lesser through rate in preference to the sum of two local rates. The fact that the vast bulk of Duquesne's business is conducted for individuals shipping over the Pennsylvania Railroad is evidence of the fact that the railroad has used facilities of Duquesne to give it a competitive advantage, and that the shippers over its lines have found

it desirable to arrange for both the shipment and the storage which they desire, within the limits of one corporate family. The close tie between these two operations is further shown by the fact that these storage in transit arrangements are required to be and are subject to tariffs filed by the Pennsylvania with the Interstate Commerce Commission.

In addition to the storage functions above discussed, the evidence reveals that the railroad utilizes Duquesne as an agency for the disposal of unclaimed or damaged freight, a function closely allied to the railroad's business and which it would have to perform for itself in the absence of a convenient subsidiary agent.

It is submitted, therefore, that the above discussed items of evidence make a substantial showing to the effect that the services of Duquesne are closely related economically and functionally to the transportation services performed by the Pennsylvania Railroad and hence that the Board's conclusion to that effect is sound and should not be disturbed.

CONCLUSION

Summarizing all of the issues discussed in this brief, we have shown:

First, that the interpretation placed upon these acts by the Railroad Retirement Board is sound. It is in accord with their language and cannot be said to be inconsistent with their legislative history. It avoids the difficulty inherent in Duquesne's contention, *i.e.*, that of restricting the operation of the labor statutes to a concept of transportation which arose under the Interstate Commerce Act, a statute having wholly different aims. We anticipate that a sanctioning of such a restriction will constitute an invitation to evasion of all of

the existing railroad labor laws through the device of subsidiary corporations which may be established and made to appear to perform many phases of the normal business of railroading which are not clearly included within the term "transportation." Finally, we have called attention to the fact that the Board's interpretation is not a matter of recent development but that it represents a settled policy substantially as old as the statutes themselves, which has been consistently applied by the Board in such manner as to establish a rational line of distinction between those companies which are covered and those excluded.

Second, we have shown that, even if it be concluded that the only subsidiary companies covered by the labor statutes are those performing services which, if performed by a carrier, will be labelled as transportation under the Interstate Commerce Act, even so, Duquesne would be included, for it has been held that warehousing services may constitute transportation if performed by a carrier.

Third, we have shown that if the legal soundness of the Board's interpretation of the statutes is established, its application of that standard was justified in this case, there being ample evidence to establish the existence of a close relationship between Duquesne's services and transportation.

Respectfully submitted,

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Nos. 95 and 103

In the Supreme Court of the United States

OCTOBER TERM, 1945

RAILROAD RETIREMENT BOARD, BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES, AND GEORGE M. HARRISON, PETITIONERS

v.

DUQUESNE WAREHOUSE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

DUQUESNE WAREHOUSE COMPANY, PETITIONER

v.

RAILROAD RETIREMENT BOARD AND BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RAILROAD RETIREMENT BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 95

RAILROAD RETIREMENT BOARD, BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES, AND GEORGE M. HARRISON, PETITIONERS

v.

DUQUESNE WAREHOUSE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 103

DUQUESNE WAREHOUSE COMPANY, PETITIONER

v.

RAILROAD RETIREMENT BOARD AND BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RAILROAD RETIREMENT BOARD

OPINIONS BELOW

In No. 95 the findings and opinions of the Railroad Retirement Board are printed at R. 19–57.

The opinion of the District Court (R. 822–290)[1] is reported in 56 F. Supp. 87. The opinions of the Circuit Court of Appeals (R. 302–323) are reported in 148 F. 2d 473. In No. 103, the findings and opinions of the Board are printed at No. 103, R. 36–61. The opinion of the District Court (No. 103, R. 71–73) is not reported, and the opinion of the Court of Appeals (No. 103, R. 81–86) is reported in 149 F. 2d 507.

JURISDICTION

The judgment of the Circuit Court of Appeals in No. 95 was entered on April 24, 1945 (R. 328). A petition for rehearing was denied the preceding day, April 23, 1945 (R. 327). The petition for a writ of certiorari was filed May 28, 1945, and granted June 11, 1945 (R. 329). The judgment of the Court of Appeals for the District of Columbia in No. 103 was entered on May 14, 1945. The petition for a writ of certiorari was filed June 1, 1945 and granted June 11, 1945 (No. 103, R. 87, 88). The jurisdiction of this Court in both cases is based upon the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

[1] Except where otherwise indicated, record references are to the record in No. 95. The records before the Retirement Board in the two cases were, by stipulation, identical, and the parties have agreed that they be printed only in the record in No. 95.

QUESTION PRESENTED

Whether a warehouse company wholly owned by the Pennsylvania Railroad Company and engaged primarily in storage for shippers and consignees of goods transported or to be transported on the Pennsylvania and also in the salvaging of over freight and damaged freight for the Pennsylvania is a company owned by a carrier and "which operates any equipment or facility or performs any service * * * in connection with the transportation of * * * property by railroad, or the receipt, delivery, * * * transfer in transit, storage, or handling of property transported by railroad" within the meaning of Section 1 (a) of the Railroad Retirement Act of 1937 and the identical language of the Railroad Unemployment Insurance Act.

STATUTES INVOLVED

The statutes involved are the Railroad Retirement Act of 1937, 50 Stat. 307, as amended, 45 U. S. C. Secs. 228a–228s, and the Railroad Unemployment Insurance Act, 52 Stat. 1094, as amended, 45 U. S. C. Sec. 351, *et seq.* The pertinent provision in Sec. 1 (a) of each statute, is quoted immediately below. Other provisions of the Acts are set forth in the Appendix, *infra*, pp. 70–79.

Section 1. For the purposes of this Act—

(a) The term "employer" means any carrier (as defined in subsection (m) of

this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: * * *

STATEMENT

No. 95: The primary function of the Railroad Retirement Board under the Railroad Retirement Act is to adjudicate claims of eligible employees for annuity, pension or death benefits. The eligibility of an employee for such benefits is based on service to entities which are included within the definition of "employer" in the Act. Section 1 (b), 45 U. S. C. Sec. 228a (b) (*infra*, p. 71). Following applications for such benefits by employees of the Duquesne Warehouse Company, the Board was faced with the initial question whether Duquesne was such an employer. In a proceeding to determine this question, the Board held a

hearing[2] and found that Duquesne was an "employer" under the Act. Contending that it was not properly held to be an "employer," Duquesne thereupon brought suit in the United States District Court for the Southern District of New York to compel the Board to set aside its order, pursuant to the review provisions contained in Section 11 of the Act (45 U. S. C. Sec. 228k *infra*, p. 72) (R. 3–11). The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and the president of the Brotherhood, G. M. Harrison, were permitted to intervene as defendants (R. 277–278). The District Court granted summary judgment for Duquesne (R. 292–293), and the United States Circuit Court of Appeals for the Second Circuit affirmed, Judge Frank dissenting (R. 302–323). Upon petition by the Board, this Court brought the case here by certiorari.

No. 103: Under the Railroad Unemployment Insurance Act, the Board adjudicates claims of eligible employees for unemployment insurance payments. Eligibility for such payments is governed by the same criteria as under the Railroad

[2] The record before the Board at the hearing consisted of questionnaires, affidavits and statements filed by Duquesne. The parties did not request that oral testimony be taken, and agreed that the case should be submitted on the record indicated (R. 249–250, 264). The case was argued orally before the Board by Duquesne and by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (R. 20).

Retirement Act—whether the employee rendered service for an "employer" as defined in the Act. (Sec. 1 (d) 45 U. S. C. 351 (d) *infra*, p. 76). An award of benefits to employees of the Duquesne Warehouse Company under the Railroad Unemployment Insurance Act being in question, the Board instituted a similar proceeding thereunder to determine whether the Company was an "employer." The Board made identical findings on the same record, determining Duquesne to be an "employer" under that Act (No. 103, R. 36–43). Pursuant to Section 5 (c), (f) of the Unemployment Insurance Act (45 U. S. C. Sec. 355 (c), (f) *infra* pp. 77–79) the company brought suit in the United States District Court for the District of Columbia to set aside that order (No. 103, R. 1), and the Brotherhood again intervened in support of the order (No. 103, R. 65–70). The District Court granted Duquesne's motion for summary judgment (No. 103, R. 71–73), but the United States Court of Appeals for the District of Columbia reversed (No. 103, R. 81–86). This Court granted a writ of certiorari upon Duquesne's application therefor.

The facts disclosed by the records before the Board (which are printed in full only in the Record in No. 95, R. 18–277), and as found by the Board (R. 19–45), may be summarized as follows:

The Duquesne Warehouse Company is a Pennsylvania corporation all of whose stock is owned by the Pennsylvania Railroad Company, a carrier

by railroad subject to part I of the Interstate Commerce Act; the principal officers of Duquesne are officers of Pennsylvania (R. 58–61, 108, 133). Duquesne's charter provides that it was "formed for the purpose of conducting a storage and warehouse business" (R. 67). It has been engaged in receiving, delivering, storing, and other handling of goods transported over the lines of Pennsylvania (R. 61–64, 108–110, 133–138). In the performance of these services, Duquesne operates two warehouses in buildings owned and leased to it by Pennsylvania, one in Pittsburgh and the other in East Liberty, within the Pittsburgh city limits (R. 108–109, 133). Each building is on a rail siding of Pennsylvania, and part of the ground floor of each is retained by Pennsylvania and officially designated as its "freight agency" or station (R. 108, 133). Parts of the Pittsburgh building are sublet by Duquesne to independent manufacturing concerns (R. 137).

At the East Liberty Warehouse, Duquesne handles and stores only one commodity, carload sugar, all of which comes in and goes out over Pennsylvania's rails (R. 61, 108, 134). The sugar is handled by Duquesne under storage-in-transit privileges covered by railroad tariffs filed by Pennsylvania with the Interstate Commerce Commission (R. 61–62, 135–136). Incoming shipments are consigned to the owner care of Duquesne, the route being designated as "Penn RR—For Stge in

"Transit"; and outgoing shipments are consigned to the owner, the bill of lading having a transit record number and being marked "accorded transit privilege at East Liberty, Pa." (R. 134, 170, 171). Duquesne unloads the sugar from Pennsylvania's railroad cars upon their arrival and reloads the sugar into Pennsylvania's railroad cars upon their departure (R. 61, 109, 134, 135).[3]

At its Pittsburgh warehouse, Duquesne handles freight which has come in, or is destined for movement, over Pennsylvania's rails, or which has both come in and is going out over Pennsylvania's rails (R. 108). The commodities handled at that place are diverse in character and are hauled in both carload and less-than-carload form; approximately 95 per cent come in by rail, and approximately 60 per cent leave by rail (R. 108, 136–137, 83–84). The services performed by Duquesne at the Pittsburgh warehouse are similar to those at East Liberty in so far as carload freight is concerned (R. 62, 109–110, 133–134, 136–137). Duquesne loads and unloads the railroad cars as they arrive at and depart from its platform, stores the railroad-transported goods, and performs other handling services in connection with the receipt and delivery of such goods. Duquesne charges the owner for the performance of these services. As to the less-

[3] The governing tariff requires that carload freight be loaded and unloaded by the owner, and Duquesne performs these functions on behalf of the owner (R. 134–135).

than-carload freight, Duquesne stores it and also performs the handling services involved in delivering it to and receiving it from Pennsylvania's platform. In the case of incoming less-than-carload shipments, the freight is unloaded by Pennsylvania from the cars to its platform and is delivered to and received by Duquesne on such platforms. In the case of outgoing less-than-carload shipments, Duquesne delivers the freight on Pennsylvania's platform; Pennsylvania then issues its bill of lading, loads the freight into the cars, and moves them out (R. 62, 109, 136–137).

While the freight is in Duquesne's warehouse it is under the control and direction of the owner, and the responsibility of Duquesne to the owner is that of warehouseman (R. 135). Duquesne performs services such as storing, packing and assembling as required by the owner (R. 135).

During the period between August 1937 and May 1938, Duquesne also performed unloading, storing and reloading services and other transit services at Erie, Pennsylvania, in connection with carload shipments of newsprint paper entitled to storage-in-transit privileges under Pennsylvania's tariffs. These services were similar to those performed by Duquesne at East Liberty (R. 61–62, 138).

Since 1922 Duquesne has been a party to "salvage freight" agreements with Pennsylvania whereby Pennsylvania turns over to Duquesne

for resale and disposal over and damaged freight which has been refused or unclaimed by the owner (R. 62–63, 108, 137, 85–89, 179–185). For this service Duquesne retains 10 per cent of the gross proceeds plus certain costs and turns the balance over to Pennsylvania. The contracts require Duquesne to deliver all such freight to Pennsylvania or to the true owner, if his identity is ascertained or if he requests delivery before the goods are sold (R. 86–87, 101).

The employees of Duquesne are hired and discharged by it and paid from its own funds, and are supervised not by Pennsylvania but by Duquesne's supervisor. The employees are not entitled to become members of a relief department or a loan association composed of Pennsylvania employees (R. 137). They are, however, affiliated with and represented for purposes of collective bargaining by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, a railway labor organization, and their working conditions are governed by contract between the Brotherhood and Duquesne (R. 25, 89–99). Duquesne has paid and is paying taxes under the Federal Social Security Act and State Unemployment Compensation law rather than under the Railroad Retirement law (R. 138).

From the above facts the Board found that (R. 21, 25):

> Duquesne's operations are * * * intimately and integrally related to Pennsylvania's railroad transportation. * * *
>
> The two warehouses operated by Duquesne —one in Pittsburgh proper and the other at East Liberty in Pittsburgh—have been valuable links in the chain of Pennsylvania's railroad transportation. * * *
>
> * * * * * *
>
> Duquesne's operations are * * * directly related, functionally and economically, to the performance of the transportation obligation which Pennsylvania has undertaken as a common carrier by railroad, and to the receipt, delivery, transfer in transit, storage, and handling of property transported by Pennsylvania by railroad.

The Board concluded that Duquesne was an employer within the meaning of Section 1 (a) of the Railroad Retirement Act because it was (R. 25)—

> * * * engaged in the non-casual operation of equipment and facilities and the performance of non-casual service in connection with Pennsylvania's transportation of property by railroad, other than trucking service, and the receipt, delivery, transfer in transit, storage, and handling of property transported by Pennsylvania by railroad.

The Second Circuit Court of Appeals set this determination aside (No. 95), but the Court of Appeals for the District of Columbia upheld an

identical determination of the Board under the Railroad Unemployment Insurance Act (No. 103). Both cases are before this Court on writs of certiorari.[1]

SUMMARY OF ARGUMENT

The Railroad Retirement Act applies to employees of carriers, and of subsidiaries of carriers engaged in performing services "in connection with the transportation * * * of property by railroad" or "in connection with" the "receipt, delivery * * * storage, or handling of property transported by railroad." Persons performing the services here involved would undoubtedly be covered if employed by Pennsylvania. The question is whether employees performing the same services for Pennsylvania's subsidiary are covered by the statutory definition.

I

A. The Board has construed the above language as reaching subsidiaries performing services "reasonably directly related, functionally and economically, to the performance" of a railroad's common carrier obligation, irrespective of whether

[1] This brief is designated as the Government's main brief for both No. 95, arising under the Railroad Retirement Act, and No. 103, arising under the Railroad Unemployment Insurance Act. When reference is made herein only to the Retirement Act, the Court may assume that the two statutes are identical, as they are in the provisions principally involved.

such services constitute transportation within the meaning of the Interstate Commerce Act. The Board's construction of the Act is supported by the statutory language, which, though obviously designed to cover only services having some relation to railroading, is on its face not susceptible of the limitation to mere "transportation" which Duquesne seeks to read into it. Such a construction would make most of the words of the statute's definition surplusage. This is even more true of the suggestion that the definition only reaches transportation services which a carrier is obligated to perform.

B. The legislative history of the Act does not disclose any Congressional intention inconsistent with the statute's language. It was undoubtedly intended that the Act have the same general scope as the Interstate Commerce Act, and there are some remarks in committee hearings which suggest adoption of the test of "transportation" embodied in the Commerce Act. The same speakers, however, manifested a specific intention that railroad subsidiaries performing certain functions which would not have been reached by the Commerce Act definition be covered, and similar statements were made by sponsors of the Act in committee reports and on the floor of Congress. The legislative materials thus indicate that as to certain peripheral activities the Retirement Act was not intended to have the same meaning as the defi-

nition of transportation in the Interstate Commerce Act.

In addition the authorities under the Interstate Commerce Act itself are not entirely consistent as to what is included within the term "transportation", the decisions seemingly varying with the nature of the problems raised. These authorities accordingly do not present a sufficiently clear pattern to require deviation from the test supported by the statutory language.

Even if the Interstate Commerce Act definition were regarded as controlling, the legislative history of the definition in the Retirement Act indicates at the very least that Congress meant to reach those activities of railroad subsidiaries which would have been transportation services if performed by the railroad companies themselves. The test is not whether a subsidiary would itself be subject to the Interstate Commerce Act definition.

II

If the Board did not apply improper criteria in reaching its decision, its ruling should be accepted as long as not arbitrary or unsupported by substantial evidence or, as it has been more precisely stated, "when there is found to be a rational basis for the conclusions."

A. The Board's finding that Duquesne is closely related functionally and economically to Pennsyl-

vania is adequately supported. The activities of a warehouse, located on a railroad siding in a building used by the railroad as a freight station, in loading and unloading and storing (including storage in transit) freight almost all of which is transported by the railroad are clearly advantageous to the railroad and directly connected with its normal functions. Moreover, the salvage freight agreement whereby Duquesne disposes of Pennsylvania's unclaimed and damaged freight manifests the close economic relationship between Duquesne and Pennsylvania.

B. Even if the test be that of "transportation" under the Interstate Commerce Act, numerous cases hold that loading and unloading and storage, including storage in transit, by a carrier constitute transportation. This would suffice to subject such services to the Retirement Act when performed by a carrier subsidiary. Although the authorities are not uniform, they certainly provide a reasonable basis for the Board's conclusion that at least a substantial part of Duquesne's activities would have constituted transportation if undertaken by Pennsylvania directly, and that accordingly the performance of such services by Pennsylvania's subsidiary comes within the Retirement Act.

ARGUMENT

Introductory Statement

The Railroad Retirement Act and the Railroad Unemployment Insurance Act apply to carriers by railroad subject to Part I of the Interstate Commerce Act, and to any company (1) which is owned or controlled by any such carrier and (2) "which operates any equipment or facility or performs any services (except trucking service, casual service, and casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad."[5]

If the Pennsylvania Railroad, which is admittedly a carrier subject to Part I of the Interstate Commerce Act, performed the services involved in this case, its employees would unquestionably be covered by the statutes.[6] The employees of subsidiaries of carriers are also covered if they perform the services described in the second part of the above definition. Duquesne, which is not a "carrier" subject to Part I of the Commerce

[5] Railroad Retirement Act, Section 1 (a), (m), 45 U. S. C. sec. 228a (a), (m); Railroad Unemployment Insurance Act, Section 1 (a), (b), (d), 45 U. S. C. sec. 351 (a), (b), (d).

[6] Railroad Retirement Act, Section 1 (a), (b), (m), 45 U. S. C. sec. 228a (a), (b), (m); Railroad Unemployment Insurance Act, Section 1 (a), (b), (d), 45 U. S. C. sec. 351 (a), (b), (d).

Act, is concededly wholly owned and controlled by Pennsylvania. The sole question in these cases is whether the Board could properly find Duquesne to be a company performing any of the described services.

If the statutory words are given their ordinary meaning, the definition fits Duquesne in five different respects. Duquesne performs services in connection with (1) receipt, (2) delivery, (3) storage, and (4) handling, of property transported by railroad, and, also, more generally, (5) in connection with transportation of property by railroad. Indeed, in so far as the first four of these expressions are concerned, it is unnecessary to determine the precise scope of the phrase "in connection with", since respondent actually receives, delivers, stores and handles goods transported by railroad and thus obviously perform services connected with such receipt, delivery, storage, and handling.

Although the Court of Appeals for the District of Columbia unanimously held that the words of the statute should be given their ordinary meaning (No. 103, R. 83–84), the majority of the Second Circuit concluded that as a matter of law the statutory definitions denote only "transit and cover acts done only by or for the carrier while its obligations persist" (R. 305). Duquesne also has argued that the definition applies only to services performed "while the property is being

transported in railroad service" (Appellee's Br., App. D. C., p. 9).

The Retirement Board, in rejecting these contentions, has construed the services described in the definition as being those "reasonably directly related, functionally or economically, to the performance of obligations which a company or person or companies or persons have undertaken as a common carrier by railroad, or to the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad." This administrative interpretation of the statute has been embodied in regulations[7] and Board decisions[8] which in themselves are an important factor in determining the statute's meaning. *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 139–140.[9] It is our position that the Board has not erred as a matter of law

[7] 20 C. F. R. 202.7; 20 C. F. R. Cum. Supp. 301.4.

[8] See Railroad Retirement Board Law Bulletin No. 2, December 1940, which collects illustrative decisions of the Board up to that date with respect to companies performing services in connection with railroad transportation.

[9] The Railroad Retirement Board, which is charged with the responsibility of administering and, in the first instance, interpreting the Retirement Act, is the expert body specializing in and familiar with the railroad field. The Social Security Act covers employees not subject to the Retirement Act. We believe that in these circumstances the reasons underlying judicial respect for administrative interpretations of the Retirement Act apply to the Retirement Board to a much greater extent than to the Social Security Board.

in giving the statute the above construction, and that, assuming no error of law in construing the Act, the Board's decision is binding upon the courts since not without warrant in the record or a reasonable basis in law. *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 131; *Gray* v. *Powell*, 314 U. S. 402.

The Board also held (R. 29–31) that even assuming that Section 1 (a) of the Retirement Act has no broader meaning than "transportation" as defined in Section 1 (3) of the Interstate Commerce Act, the result would be the same. For Duquesne is engaged in loading, unloading and storage, including storage in transit, of property transported by railroad, and these operations have been held to constitute transportation under the Interstate Commerce Act. In this connection it should be noted that the question is not whether the performance of these services by a railroad-controlled subsidiary would constitute "transportation" within the meaning of the Interstate Commerce Act. It can be assumed, *arguendo*, that they would not, since Duquesne is not a carrier subject to that Act. But we think that both the language and history of the Retirement Act demonstrate that if performance of a service by a carrier would come within the definition of transportation in the Commerce Act, performance of the same service by a carrier-controlled subsidiary would come within the Retirement Act.

The Board's decision that Duquesne is subject to the Retirement Act must be upheld if the Board is correct on either of the two alternative theories on which its ruling was based.[10]

This brief is presented on behalf of the Railroad Retirement Board, which is charged with the duty of administering the Railroad Retirement and Railroad Unemployment Insurance Acts. The Bureau of Internal Revenue, which

[10] The American Warehousemen's Association has filed a brief as *amicus curiae* in which it foresees serious consequences for the independent warehousing industry if the Board's decision is upheld (Br., pp. 4–7). We do not see how independent warehousing companies will be harmed if railroad-affiliated warehouses alone are brought under the Retirement Act and related legislation, under which, at present, they have to pay higher taxes than their independent competitors. The Association's primary fear seems to be that the Board's decision may have the effect of holding the independent warehousemen to be engaged in "common carrier transportation service" subject to the regulatory provisions of the Interstate Commerce Act, and of depriving them of the protection against discriminatory railroad practices accorded by such cases as *Baltimore & O. R. Co.* v. *United States*, 305 U. S. 507. The Board's opinion on its face and the arguments herein presented on behalf of the Board can hardly be thought to have any such effects. As we show, the Board interprets the provisions of the Act for the coverage of railroad-controlled subsidiaries as *not* embodying the definition of transportation in the Interstate Commerce Act. And even when it assumes the contrary, the Board recognizes that the definition of transportation has been and must be read in the various contexts and purposes of the several statutory provisions, so that no principles presently established under other laws would be overturned by bringing carrier-controlled warehouses under the Retirement Act and related legislation.

enforces both the Carriers Taxing Act and the taxing provisions of the Social Security Act, is in accord with the position of the Retirement Board. The Social Security Board, however, has requested the Solicitor General to advise the Court that it does not agree with the interpretation of the Retirement Board, and that it has not followed this interpretation in administering the Social Security Act, which exempts employees subject to the railroad retirement legislation.[11] A statement by the Social Security Board of its position is appended hereto as Appendix E, *infra*, p. 84.

We think that inclusion of this statement is particularly appropriate in view of the conflict in the lower courts, and the circumstance that Government counsel in the present cases are charged with the responsibility of representing the Retirement Board. While we have endeavored to set forth all the pertinent materials in our brief, it is hoped that the statement of the Social Security Board's views will assist the Court in reaching a considered judgment.[12]

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[11] Social Security Act, Sec. 209 (b) (9), 42 U. S. C. Sec. 409 (b) (9); Internal Revenue Code, Secs. 1426 (b) (9), 1607 (c) (9.

[12] The definition in Section 1 (a) was first embodied in the Railway Labor Act amendment and the original Railroad Retirement Act (held invalid in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330), both of which were enacted in June 1934. 48 Stat. 1185, 1283. In 1934 there was no Social Security Act, so that the Retirement Act was un-

I

THE BOARD HAS PROPERLY CONSTRUED THE ACT

A. THE LANGUAGE OF THE ACT SUPPORTS THE BOARD'S INTERPRETATION

Under the Act's coverage provisions, the operation of facilities and equipment and the performance of the service must be "in connection with the transportation of passengers or property by railroad," or "in connection with" the "receipt, delivery * * * storage, or handling of property transported by railroad" by a carrier subsidiary. The statute was designed to apply to the railroad industry, and only subsidiaries performing services "connected" with transportation or other services performed by railroads were to be reached. Both by regulation and decision the Board has filled in the statutory definition, giving content to its general sweep. The Board's

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doubtedly intended to be liberally construed without regard for the existence of a general old age benefit system. Although the Social Security Act, with its special exception for persons subject to the railway legislation, became law in 1935, before the reenactment of the Retirement Act in its present form in 1937, the coverage provisions of the latter statute in so far as pertinent here were not changed and were undoubtedly meant to have the same meaning as before.

The taxes collected under the Railroad Retirement system are higher than under the Social Security Act. The benefits paid to individual claimants are likewise generally considerably higher, but the provisions in the Social Security Act for additional payments to wives and minor dependent children and for payments to surviving wives and minor dependent children sometimes result in families receiving larger amounts under the Social Security Act.

criterion is whether the service is "reasonably directly related, functionally or economically, to the performance" of a railroad's common carrier obligation. In amplification of this text the Board stated in its opinion in the instant case (R. 32):

> the Board has construed the carrier-affiliate coverage provision as denoting services which are an integral part of, or are closely related to, the rail transportation system of a carrier and as including within its coverage (1) carrier affiliates engaged in activities which are themselves railroad transportation or which are rendered in connection with goods in the process of transportation, such as loading and unloading railroad cars, receipt, delivery, transfer in transit, and other handling of property transported by railroads; and also (2) carrier affiliates engaged in activities which enable a railroad to perform its rail transportation, such as maintenance and repair of way and equipment, and activities which enable a railroad to operate its rail system more successfully and to improve its services to the public, such as auxiliary bus transportation, dining facilities, and incidental warehousing services.

This interpretation of the statute gives effect to all the language employed by Congress and adheres to the legislative objective of providing benefits for employees within the railroad industry whether employed by a carrier or its subsidiary. It also fits

within the ordinary meaning of the words, for it cannot be denied that the storage and other functions such as are performed by Duquesne are in a real and substantial sense "connected with" the transportation of property by railroad, and with storage and handling of "property transported by railroad."

On the other hand, Duquesne and the Second Circuit seek to construe the definition of "employer" in the Act as reaching only persons performing services while property is being transported, while it is in "transit", or while the railroad's obligation as carrier persists (R. 305). This would limit the definition to services which are a part of rail transportation and possibly exclude even some of such services, as we shall see. See pp. 26, 40–44, *infra*.

There is no point to most of the definition if that is all it means. The Act does not say "in the course of transportation" or "while being transported", but "in connection with the transportation", which is obviously a broader term. *Danciger* v. *Cooley*, 248 U. S. 319, 327;[13] *California* v. *United States*, 49 F. Supp. 474 (N. D. Cal.),

[13] In the *Danciger* case the Court said (248 U. S., at 327): "To be within the statute it is essential that the act of collecting the purchase price be done 'in connection with the transportation of' the liquor. The statute does not say 'in the transportation,' but 'in connection with' it. Transportation, as this court often has said, is not completed until the shipment arrives at the point of destination and is there delivered. * * * What Cooley did, while not part of the transportation, was closely connected with it."

affirmed, 320 U. S. 577;[14] *Wallzabenstein* v. *Industrial Commission*, 195 Wis. 15 (household domestic in farmhouse performs duties "in connection with such farm"); *J. Ray Arnold Lumber Corp.* v. *Richardson*, 105 Fla. 204 (hauling logs from woods to railroad constitutes work "in connection with" the lumber mill); *Gurney* v. *Atlantic & G. W. Ry. Co.*, 58 N. Y. 358, 366–372 (an attorney independently retained by railroad company an employee "in connection with that company's railways"); *Kokusai Kisen Kabushiki Kaisha* v. *Columbia S. Co.*, 23 F. Supp. 403, 405–406 (S. D. N. Y.), affirmed without opinion, 100 F. 2d 1016 (C. C. A. 2d). And the expressions following "transportation" presumably add something further, even apart from the prefix "in connection with," or they would not be used. Although delivery, receipt and handling may be a

[14] In the *California* case the district court stated (49 F. Supp., at 478):

"It is inadmissible to suppose that this phrase limits the definition of 'other persons' to those whose operations form part of the act of water transportation for the result would follow that no persons are affected other than common carriers by water. We need not labor the point. The statutory verbiage seems clear enough as it stands."

On the same point this Court stated (320 U. S., at 586):

"And whatever may be the limitations implied by the phrase 'in connection with a common carrier by water' which modifies the grant of jurisdiction over those furnishing 'wharfage, dock, warehouse, or other terminal facilities,' there can be no doubt that wharf storage facilities provided at shipside for cargo which has been unloaded from water carriers are subject to regulation by the Commission."

part of transportation in some circumstances, they need not be. And storage even more clearly does not have the same meaning as transportation, although some storage may be included within it.

The Act on its face thus refutes the contention that the definition in Section 1 (a) means only "transportation". For such a construction would make most of the words in the definition surplusage, or a prolix way of stating a simple thought. The simple phrase "services in the course of transportation" would have sufficed.

Even more clearly is the statutory language inconsistent with the more restrictive interpretation limiting it to services performed pursuant to a railroad's obligation as a carrier. Services may be "transportation"—and thus obviously be "connected with transportation"—even if the carrier is not obligated to perform them. See pp. 40–44, *infra*. Carriers are not required to load or unload carload freight or to provide pick-up and delivery service or transit privileges, but when they undertake such operations they are furnishing transportation service, and even more patently, service "connected with" transportation, receipt, delivery and storage of property transported.[15] We fail to see any basis in the words employed by Congress for the narrow construction suggested by Duquesne.

[15] See cases discussed *infra*, pp. 40–44.

B. THE LEGISLATIVE HISTORY OF THE STATUTE IS NOT INCONSISTENT WITH THE BOARD'S INTERPRETATION

The legislative history of the Act does not disclose any Congressional intention inconsistent with the statute's language. It was undoubtedly intended that the Act was to have the same general scope as the Interstate Commerce Act. But there are also specific manifestations of an intention that the Act not be strictly limited to "transportation" services, for it was clearly contemplated that controlled contractors or subsidiaries engaged in maintenance of railroad cars and equipment be covered. And even if the legislative design be regarded as having embodied substantially the definition of "transportation" in the Interstate Commerce Act,[16] the insertion of the carrier affiliate provision shows a definite intention to reach all services performed by affiliates which would have been included within the Interstate Commerce Act definition if performed by the carriers themselves.

The purpose of extending the statute beyond the employees of railroad companies is disclosed in the legislative history. The definition in the Retirement Act comes, without substantial change, from the Railway Labor Act of 1934.[17] The only

[16] Section 1 (3) of the Interstate Commerce Act is set forth in Appendix D, *infra*, p. 81.

[17] Section 1, First of the Railway Labor Act, 48 Stat. 1185, 45 U. S. C. sec. 151, First, is set forth in Appendix C, *infra*, p. 80.

pertinent comments in the proceedings leading to the adoption of the latter statute are those by Commissioner Eastman, who as Federal Coordinator of Transportation was instrumental in drafting the Labor Act and explained its provisions to the legislative committee. The bill first proposed by Mr. Eastman reached only services covered by the Interstate Commerce Act's definitions of "railroad" and "transportation".[18] Mr. Eastman explained that he intended the bill to reach not only carriers covered by the Interstate Commerce Act (as had the Railway Labor Act of 1926), but also "operations which form an integral part of railroad transportation, but which are performed by companies which are not now subject to the Railway Labor Act."[19] In particular he mentioned refrigerator car companies, which had been held not subject to the Interstate Commerce Act,[20] and companies to which railroads have "on occasion contracted out their maintenance work on equipment and even on way and structures,"[21] which also were not included within the Commerce Act definition. He stated that he was "not sure" the language originally suggested, which would

[18] Hearings before Senate Committee on Interstate Commerce on S. 3266, 73rd Cong., 2d Sess., p. 1.

[19] *Id.*, pp. 10–11.

[20] *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434; *United States* v. *Interstate Commerce Commission*, 265 U. S. 292; *In the Matter of Private Cars*, 50 I. C. C. 652; *Perishable Freight Investigation*, 56 I. C. C. 449.

[21] Hearings, *supra*, p. 10.

not have gone beyond the Commerce Act definition, reached "all companies to which railroads on occasion have contracted out their maintenance work" [22] and that the definition "perhaps should be examined rather carefully from that point of view." [23] After the Chairman of the Committee had objected to the technique of incorporating by reference the definitions of the Interstate Commerce Act,[24] Mr. Eastman redrafted the definition, to include companies owned or controlled by carriers and performing the services specified in the Act as finally adopted. He then stated, perhaps not entirely consistently with his own prior remarks, "I am inclined to believe that for the present it would be well not to go beyond carriers and their subsidiaries engaged in transportation." [25] Mr. Eastman further declared before the House Committee which subsequently considered

[22] At least 25 carriers had used this device as a means of escape from the labor provisions of the Transportation Act, 1920. *Railway Employees' Department, A. F. of L.* v. *Indiana Harbor Belt R. Co.*, 3 U. S. Railroad Labor Board 332; Resolution, *id.*, pp. 1137, 1138. The resolution stated that: "the board is in possession of information to the effect that certain carriers have violated the wage and rule decisions of the board by contracting out the work of the railway employees, with the result that wages have been unlawfully reduced, and rules and working conditions unlawfully changed, and that certain carriers have violated and failed to put into effect the decisions of the board which held such contracts to be unlawful."

[23] Hearings, *supra*, p. 11.

[24] *Ibid.*

[25] *Id.*, p. 145.

the bill: "The definition includes words descriptive of such transportation service which are taken from the provisions of the Interstate Commerce Act." [26] "It seemed to me that a satisfactory compromise would be to limit the definition to railroads or similar companies and the subsidiaries which they control which are engaged in transportation service recognized by the Interstate Commerce Act." [27]

The language of the Railway Labor Act was taken substantially without change into the Retirement Act and related legislation. The few references to its meaning in the history of the latter statutes are, of course, pertinent as manifesting the Congressional understanding. The Retirement Act of 1937 (50 Stat. 307, 45 U. S. C. sec. 228a (a)), which we are considering, amended the original definition in the Railway Labor Act and the earlier Retirement Acts [28] explicitly to exclude "casual service, and the casual operation of equipment or facilities," and to include "railroad associations, traffic associations, tariff bureaus, demur-

[26] Hearings before House Committee on Interstate and Foreign Commerce on H. R. 7650, 73rd Cong., 2d Sess., p. 17.

[27] *Id.*, p. 18.

[28] The first Railroad Retirement Act, which was enacted June 27, 1934, 48 Stat. 1283, was declared invalid in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330. A revised measure was passed August 29, 1935, 49 Stat. 967, 45 U. S. C. Secs. 215–228. After being held invalid by a district court in the District of Columbia, this Act was amended by and incorporated in the Railroad Retirement Act of 1937, 50 Stat. 307, 45 U. S. C. Sec. 228a, *et seq.*

rage bureaus, weighing and inspection bureaus, collection agencies and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation."

The Senate Committee Report (No. 697, 75th Cong., 1st Sess., p. 7) explained the exclusion as follows:

> it is intended to exclude employees of a contractor who may, for example, be occasionally employed by a "carrier" to repair a depot or build a bridge. Contractors, other than those which perform casual service, would not be excluded, irrespective of whether control be legal or de facto. * * *
>
> By these changes there are brought within the scope of the act substantially all those organizations which are intimately related to the transportation of passengers or property by railroad in the United States.

Such non-casual contractors engaged in repair and construction work, who were not thought to be excluded from the Act, would not have been regarded as engaged in transportation in the ordinary sense, or within the meaning of the Interstate Commerce Act.

The inclusion of railroad associations and bureaus was explained in both the House and Senate Committee reports (H. Rept. No. 1071, 75th Cong., 1st Sess., p. 3; S. Rept. No. 818, 75th Cong., 2d

Sess., p. 2) in the Carriers Taxing Act (50 Stat. 435, 45 U. S. C. sec. 261) as follows:

> While it seems clear that it is the intent of the present Act to embrace within its scope the various railroad associations, the matter is now to be made clear beyond question by a specific inclusion of such organizations.

The Senate Report on the Retirement Act (S. Rept. No. 697, 75th Cong., 1st Sess., pp. 6–7) also declared that such associations "probably are embraced in [the] very general terms" of the earlier statute. Since some of such associations are not engaged in railroad transportation in any sense of the term, Congressional recognition that they were within the scope of the carrier-affiliate coverage provisions of the 1935 Acts is evidence that Congress did not think those provisions were restricted to organizations engaged in railroad transportation either in the ordinary sense or as defined in Section 1 (3) of the Interstate Commerce Act.

More closely pertinent to the present case is the observation of Senator Wagner, who was in charge of the Retirement Bill in the Senate, that (81 Cong. Rec. 6223):

> It [the 1937 Retirement Act] has certain advantages over the present act.
>
> In the first place, the coverage is extended expressly to railroad labor organizations, railroad associations, traffic associations,

and is made more clearly applicable to subsidiaries of railroad companies such as refrigerator, *storage and other facilities*. In other words, *it covers a greater number of employees, not only those directly in the railroad business but those associated with it*, and in that regard it is more liberal than the present act. [Italics supplied.]

The reference to "storage", of course, fits this case. And the statement that the Act covers not only those employees "directly in the railroad business but those associated with it" indicates that coverage was to include services not forming a part of railroad transportation.

At the hearing on the 1937 bill Mr. George M. Harrison, Chairman of the Railway Labor Executive Association, who explained the provisions of the bill, gave as an illustration of a subsidiary subject to the Act:[29]

> For instance, they have elevator companies that handle the *storage* of grain. They may be indirectly owned or controlled by a railway company. It is a railway facility. But it is operated through a subsidiary organization. If they did not have the subsidiary organization, it probably would have its own grain elevator.
>
> This act covers those men. They may have a refrigerator car company. They may have a subsidiary organization han-

[29] Hearings before House Ways and Means Committee on H. R. 6448, 75th Cong., 1st Sess., p. 9.

dling some of their mechanical work; some of their accounting and collecting.

Mr. Harrison also made statements to the effect that the definition reached carrier-controlled companies "when those companies are engaged in the business of transporting passengers or property for the railroad, or other service that is a part of railway transportation," [30] and that it reached controlled companies "engaged in the business of transporting passengers or property." [31]

Mr. Harrison, like Mr. Eastman, when discussing the subject generally, spoke with reference to the term "transportation" employed in the Interstate Commerce Act; but when giving illustrations of what was to be covered, he mentioned activities which do not seem to come within the Commerce Act concept of "transportation."

The inference which we draw from the legislative history [32] is that Congress meant to reach the

[30] See Hearings before House Committee on Interstate and Foreign Commerce on H. R. 6956, 75th Cong., 1st Sess., p. 17.

[31] Hearings before House Ways and Means Committee on H. R. 6448, 75th Cong., 1st Sess., p. 6.

[32] The definition was subsequently amended in 1940, upon the recommendation of the Retirement Board, so as to exclude employers and employees engaged in the mining of coal. 54 Stat. 785. Section 6 of the amendatory act provided that

"Nothing contained in this Act, nor the action of Congress in adopting it, shall be taken or considered as affecting the question of what carriers, companies, or individuals, other than those in this Act specifically provided for, are included in or excluded from the provisions of the various laws to which this Act is an amendment."

customary operations of the railroads covered by the Interstate Commerce Act and to prevent evasion of the newer statutes by the use of subsidiaries or controlled contractors to carry out portions of the railroad's business. A company which repaired cars and locomotives, to take one of the illustrations cited, would not have been engaged in transportation itself within the meaning of the Interstate Commerce Act, or in activities which a carrier was obligated by its tariff to perform. Such companies have, however, uniformly been held subject to the Act. *Nevada Consolidated Copper Co.* v. *Railroad Retirement Board,*

The amendment, which applied to the definitions in the Railway Labor Act, the Railroad Retirement Act, the Carriers Taxing Act, and the Railroad Unemployment Insurance Act, was explained in the Senate Committee report (No. 1744, 76th Cong., 3d Sess., pp. 2–3), as follows:

"Certain carriers by railroad own and operate coal mines directly with their own employees. In addition, another and larger group of carriers have wholly owned subsidiaries engaged in mining coal for the purpose of servicing railroad operations through supplying locomotive fuel for the railroad system of the parent carrier. * * *

* * * [After] * * * a hearing * * * the Board found itself compelled by the statutory language to conclude that these companies are legally subject to the Railroad Retirement Acts and the Railroad Unemployment Insurance Act. The opinion of the Board with respect to the status of Union Pacific Coal Co., copy of which has been forwarded to the committee, shows that the conclusion was dictated not by any feeling of the Board that such coal mining operations ought, as a matter of policy, to be covered by the acts administered by the Board, but rather by consistent application of the interpretation of the acts promulgated in rulings that other carrier affiliates engaged

129 F. 2d 358 (C. C. A. 10), certiorari denied, 317 U. S. 687; *Despatch Shops, Inc.* v. *Railroad Retirement Board*, 60 F. Supp. 106 (S. D. N. Y.); *Despatch Shops* v. *Railroad Retirement Board*, No. 24451, D. D. C., decided March 19, 1945.[33]

Maintenance of way, structures, and equipment is mentioned as an example of a type of situation clearly shown by the legislative history to be intended to be covered by the Retirement Act—as the Social Security Board concedes (*infra*, p. 85)—and yet not subject to the jurisdiction of the Interstate Commerce Commission under the definition of "transportation" in Section 1 (3)

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in such activities as manufacturing and supplying equipment parts, furnishing water for locomotives, furnishing auxiliary or substitute bus or water transportation, furnishing dining facilities, treating ties, transmitting telegraphic communications, providing hospital and medical facilities, and providing maintenance of buildings, are employers subject to the acts. The Board, as well as railroad employers, railroad employees, the mine workers, the Federal Security Administrator and State unemployment compensation administrations, believes that as a matter of policy such coal-mining activities, whether conducted directly by carriers or by subsidiaries of carriers, should for purposes of a social-insurance program and for purposes of labor relations be covered by the system of laws applicable to coal mining generally rather than the system of laws applicable to the railroad industry. The committee believes such a policy to be sound and, accordingly, recommends the enactment of S. 4070 so as to exclude coal-mining operations from the acts covering the railroad industry without disturbing or prejudicing the application of those acts to other railroad affiliates. Section 6 of the bill makes this purpose clear."

[33] The two *Despatch Shops* cases have been appealed.

of the Interstate Commerce Act. Once it is recognized that there exists any type of activity which, although not so subjected to the Commission's jurisdiction, is nevertheless covered by the Retirement Act, the decisive issue in each case of carrier affiliate coverage must then be not whether the company is engaged in operations or the performance of services covered by the definition of "transportation" in Section 1 (3) of the Interstate Commerce Act but whether it comes under the particular language of Section 1 (a) of the Retirement Act—whether it is sufficiently closely connected with transportation or the enumerated services. This is the Retirement Board's test. There is no middle ground indicated by the carrier affiliate coverage provisions of Section 1 (a); either those provisions include more than the specifically enumerated services, and thus more than "transportation" covered by Section 1 (3) of the Interstate Commerce Act, or they are strictly limited to such "transportation." But as has been emphasized, the latter restrictive view, compelling as it would the exclusion from the coverage of the Retirement Act of employees of carrier affiliates engaged in work so intimately and integrally related to railroad transportation as railroad maintenance of way, structures, and equipment, and the like, would mean a confinement of coverage of the Act too restrictive in effect to be consistent with a reasonable view of

the Congressional intention. The intention to reach such employers demonstrates that the statutory definition was intended to have a broader content than is claimed by Duquesne.[34]

The legislative materials thus indicate that as to certain peripheral activities the Railway Labor Act and the Retirement Act were not intended to have exactly the same meaning as the definition in Section 1 (3), a difference which finds support in differences in the language. For while Section 1 (3) of the Interstate Commerce Act (*infra*, p. 81) refers to "transportation," it does not contain the phrase "in connection with the transportation" found in the Retirement Act, which is clearly

[34] Duquesne relies upon a statement by the Board in its 1938 Annual Report, p. 142 (No. 103, R. 60), that:

"Storage of property received for a carrier and awaiting transportation by the carrier, or awaiting delivery by the carrier following transportation, is an employer service; but performance of the usual commercial storage and warehouse business is not. * * *"

The pertinence of this statement depends upon the meaning of "usual commercial storage and warehouse business." If a warehouse business were conducted off the line of the parent corporation, or if the warehouse business were not so completely devoted to the storage and handling of goods transported by the parent railroad, the quoted language might apply. But the Board has not regarded warehousing activities connected with railroad operations as closely as in the present case as "the usual commercial storage and warehouse business." If there should be any question as to whether this is the proper interpretation of the Board's Annual Report, it should be noted that the majority of the Board which decided the present case also constituted a majority of the Board in 1938.

broader. Furthermore, the Interstate Commerce Act definition was incorporated in a statute designed to regulate the relation between carriers and shippers, and the problems of coverage presented by statutes regulating the employment relationship were not at all in mind. As this Court noted in *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, 312, with respect to various sections of the Interstate Commerce Act itself containing "the same phraseology", the meaning may vary with the "purpose in view."[35] While some of the comments during committee hearings show an intent to restrict coverage to the transportation reached by the Interstate Commerce Act, statements in the committee reports and explanations by legislators in charge of the bills, which are entitled to more weight than testimony of witnesses before committees, rebut such a restrictive interpretation. In these circumstances the legislative history cannot be said to overcome the normal meaning of the words of the statute.

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[35] The phrase "in connection with transportation", or words of similar import, although not appearing in Section 1 (3) of the Interstate Commerce Act, is found in Sections 1 (5), 6 (7) and 15 (13), quoted *infra*, pp. 82–83. But in each of those sections the phrase clearly is used in relation to the regulation of rates, fares, charges and allowances. These sections, along with Section 1 (3), originally appeared in the Hepburn Act of 1906, 34 Stat. 584, 587, 590, which was concerned only with the regulation of such matters.

In addition, uncertainty as to the meaning of the Interstate Commerce Act definition makes it an unsafe standard to follow in applying the Retirement Act. Duquesne contends that only those services which a carrier is obligated to perform are transportation services. But the decisions on the proposition under the Interstate Commerce Act itself are not in entire accord.

We deal at greater length in Point II (*infra*, pp. 61–67), with the cases relating to warehousing itself. In one of these the Interstate Commerce Commission flatly declared (*American Warehousemen's Association* v. *Inland Waterways Corp.*, 188 I. C. C. 13, 15):

> It is well recognized, however, that there are many things which a carrier may voluntarily do which it can not be required to do, and if it holds itself out to and does render storage service in connection with shipments subject to our jurisdiction such service, although not a service which it could be required to perform, is nevertheless included in the term "transportation" as defined by the interstate commerce act.

See also *C. C. C. & St. L. Ry. Co.* v. *Dettlebach*, 239 U. S. 588, quoted *infra*, p. 62. Similarly, although a railroad normally is not obligated to, and does not, load or unload carload freight,[36] when it elects to do

[36] *Loading and Unloading Carload Freight*, 101 I. C. C. 394. Cf. *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 504–505.

so "it makes of that loading a transportation service," even where the service is not covered by a filed tariff. *David Berg Industrial Alcohol Co.* v. *Reading Co.*, 142 I. C. C. 161, 163; *Haberman* v. *Pennsylvania Railroad Co.*, 234 I. C. C. 167.[37] Pick-up and delivery service, though not required of a carrier, constitutes rail transportation when the carrier elects to perform it. *Scott Bros., Inc., Collection and Delivery Service*, 4 M. C. C. 551, 552–555; *Pick-up and Delivery in Official Territory*, 218 I. C. C. 441, 473; *Coordination of Motor Transportation*, 182 I. C. C. 263, 268; *New York Dock Ry.* v. *Pennsylvania Railroad*, 62 F. 2d 1010, 1014 (C. C. A. 3), certiorari denied, 289 U. S. 750.

In other cases the Commission and lower courts have spoken as if the definition in Section 1 (3) was limited to services which formed a part of the railroad's obligation to transport. *Propriety of Operating Practices—New York Warehousing*, 216 I. C. C. 291, 348–349, affirmed in *Baltimore & O. R. Co.* v. *United States*, 305 U. S. 507; *New York Central & H. R. R. Co.* v. *General Electric Co.*, 83 N. Y. Misc. 529, 536–537 (Sup. Ct. N. Y.), affirmed, but not with reference to this point, 219 N. Y. 227, certiorari

[37] This decision preceded the provision in the Transportation Act of 1940 definitely subjecting pick-up and delivery service to Part I of the Interstate Commerce Act. See Section 202 (c) of the Interstate Commerce Act, 54 Stat. 920, 49 U. S. C. sec. 302c. The opinion of the Commission in 4 M. C. C. reverses that of Division 5, printed in 2 M. C. C. 155, upon which Duquesne relied in its briefs below.

denied, 243 U. S. 636; *American Sugar Refining Co.* v. *Delaware, L. & W. Ry. Co.*, 200 Fed. 652 (D. N. J.), reversed on other grounds, 207 Fed. 733 (C. C. A. 3); *Pennsylvania R. Co.* v. *M. McGirr's Sons Co.*, 287 Fed. 334, 337. (C. C. A. 2), certiorari denied, 262 U. S. 743. And this Court has on occasion used the phrase "service of transportation" as the equivalent of "transportation services which the carriers are bound to render," although not with reference to any issue such as is presented here. *United States* v. *American Tin Plate Co.*, 301 U. S. 402, 407–408; *United States* v. *Wabash R. Co.*, 321 U. S. 403, 406, 408, 410; *Baltimore & O. R. Co.* v. *United States*, 305 U. S. 507.

But the question in most of the above cases, including particularly those in this Court, was the right of a shipper to payment or special rates for services performed by him which the carrier was not obligated to perform, such as car spotting within a plant,[38] or hauling from plant to station.[39] The cases involving warehouses were also concerned with the lawfulness of practices resulting in dis-

[38] *New York Central & H. R. R. Co.* v. *General Electric Co.*, 83 N. Y. Misc. 529, 536–537 (Sup. Ct. N. Y.), affirmed, but not with reference to this point, 219 N. Y. 227, certiorari denied, 243 U. S. 636; *United States* v. *American Tin Plate Co.*, 301 U. S. 402, 407–408; *United States* v. *Wabash R. Co.*, 321 U. S. 403, 406, 408, 410.

[39] *American Sugar Refining Co.* v. *Delaware, L. & W. Ry. Co.*, 200 Fed. 652 (D. N. J.), reversed on other grounds, 207 Fed. 733 (C. C. A. 3); *Pennsylvania R. Co.* v. *M. McGirr's Sons Co.*, 287 Fed. 334, 337 (C. C. A. 2), certiorari denied, 262 U. S. 743.

criminatory or preferential treatment for certain shippers or warehouses.[39] To have allowed certain shippers to have obtained such advantages through performing, or receiving the benefit of, services not required of the carrier would have resulted in the kind of preference which the Interstate Commerce Act prohibits. Whether the carrier was obligated to perform the services was the vital factor in such cases. But, as the Commission recognized when the point was relevant (see p. 40, *supra*), a carrier may perform voluntary services "which it cannot be required to do" as long as it charges fairly for them, and such services when so performed come within the statutory definition of transportation.

The conclusion we draw from this review of authorities under the Interstate Commerce Act is that, just as this Court has held that "there is no single concept of interstate commerce which can be applied to every federal statute regulating commerce" (*McGleod* v. *Threlkeld*, 319 U. S. 491, 495; *Kirschbaum* v. *Walling*, 316 U. S. 517, 520), there has been no uniformly accepted concept of "transportation" under the Interstate Commerce Act. See *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 124 (employee). As we have noted, the same principle has been applied to the interpretation of different

[39] *Baltimore & O. R. Co.* v. *United States*, 305 U. S. 507; *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501.

sections of the Interstate Commerce Act. *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, 312. See also, *United States* v. *Colorado & N. W. R. Co.*, 157 Fed. 321 (C. C. A. 8), certiorari denied, 209 U. S. 544, which held that "common carrier engaged in interstate commerce" did not necessarily possess the same meaning in the Safety Appliance Act as in the Interstate Commerce Act."[11] The various ways in which cases have arisen have resulted in practical determinations which do not seem entirely consistent in theory, although the decisions themselves are not inharmonious.

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[11] In the *Colorado* case the court said (157 Fed., at 330):

"The subject of the first act was the contracts, the rates of transportation of articles of interstate commerce; the subject of the safety appliance acts was the construction of the vehicles, the cars, and engines which carry that commerce. The evils the former was passed to remedy were discrimination and favoritism in contracts and rates of carriage; the evils the latter was enacted to diminish were injuries to the employes of carriers by the use of dangerous cars and engines. The remedy for the mischiefs which induced the passage of the former act was equality of contracts and rates of transportation; the remedy for the evils at which the latter act was leveled was the equipment of cars and engines with automatic couplers. Neither in their subjects, in the mischiefs they were enacted to remove, in the remedies required, nor in the remedies provided, do these acts relate to similar matters, and the rule that the words or terms of acts in pari materia should have similar interpretations ought not to govern their construction."

In the circumstances we believe that, even if Congress intended generally that the definition in the Retirement Act have the same meaning as in the Interstate Commerce Act, no particular intent is established as to borderline situations. Since the decisions under the Commerce Act on such matters turned on and varied with the nature of the particular case and the object of the substantive provision involved, they would have furnished Congress with little guidance in relation to a statute with different objectives. The least that can be said is that the authorities under the Interstate Commerce Act furnish no clear picture as to whether services not a part of a carrier's obligation are to be included in "transportation." Courts may give weight to legislative history and background in order to give meaning to ambiguous words; but a background which itself is not consistent will not be employed to create an ambiguity in language otherwise clear.

The net result is that the legislative history of the Act does not require the departure from the normal meaning of the words employed implicit in the confining interpretation sought by Duquesne. In the absence of such an artificial and rigid limitation upon the statutory language, an unstrained interpretation can be given the definition, in the light of the Act's objectives and

the non-controversial portions of the legislative history. We think these show that Congress intended the Act to cover the services and operations of a railroad subsidiary if the type of activity was such as a railroad might engage in during the conduct of the railroad's business, whether or not it is "transportation." See No. 103, R. 83. Put another way, if certain activities are economic services which a railroad may reasonably render in close relation to its normal transportation functions, they should be covered if performed by the railroad through a subsidiary.

This is in substance the criterion adopted by the Retirement Board—whether a service or operation is "reasonably directly related, functionally or economically, to the performance of obligations * * *, undertaken as a common carrier by railroad." We think this interpretation of the Act by the Board entirely proper, and that Duquesne cannot establish that the Board's test is erroneous as a matter of law. And even if the point be regarded as doubtful, the interpretation by the agency charged with the administration of the Act should be upheld. *Skidmore* v. *Swift & Co.*, 323 U. S. 134; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315, and cases there cited.

Such a test cannot, of course, be applied mechanically or without the exercise of judgment.

Few general rules can. But the list of cases noted in the margin [42] shows how the Retirement Board

[42] Board decisions holding railroad subsidiaries or affiliates subject to the Act cover, for example: telegraph companies (*Great Northwestern Telegraph Company of Canada*, Railroad Retirement Board Law Bulletin No. 2, 385); bus companies which function in coordination with or substitution for rail operations (*Kansas City Southern Transport Co.*, *id.*, p. 76; *Missouri Pacific Transport Co.*, *id.*, p. 88); tie-preserving companies (*Santa Fe Tie & Lumber Preserving Co.*, *id.*, p. 276); hospital associations (*Chesapeake & Ohio Ry. Employees' Hospital Ass'n*, *id.*, p. 211); railroad office building companies (*Southern Pacific Bldg. Co.*, *id.*, p. 371); railroad equipment manufacturing, repair, and maintenance companies (*Lenoir Car Works*, *id.*, p. 332; *Oneida Machinery Co.*, *id.*, p. 322; *Despatch Shops, Inc.*, *id.*, p. 310); water supply companies (*Beaver Creek Water Co.*, *id.*, p. 550; *Union Pacific Water Co.*, *id.*, p. 546); railroad dining car companies and eating houses (*Fred Harvey Dining Car Operations*, *Fred Harvey*, and *Fred Harvey Service, Inc.*, *id.*, pp. 135, 138, 140); barge companies (*Kelley's Creek Barge Line, Inc.*, *id.*, p. 13); railroad land companies (*Rock Island Improvement Co.*, *id.*, p. 266); dock and terminal companies (*Allouez Bay Dock Co.*, *id.*, p. 168; *Long Dock Co.*, *id.*, p. 169).

Board decisions holding railroad subsidiaries or affiliates not subject to the Act cover: bridge companies (*Bridge Company*, Railroad Retirement Board Law Bulletin No. 2, p. 41); independently operated passenger motor bus companies (*Soundview Transportation Company*, *id.*, p. 111; *Jamieson Stages, Incorporated*, *id.*, p. 112); cement companies (*Arkansas Portland Cement Company*, *id.*, p. 120); lumber companies (*Frost Lumber Industries, Incorporated of Texas*, *id.*, p. 120; *Puget Sound Pulp and Timber Company*, *id.*, p. 303; *Southwest Lumber Mills, Incorporated and Cady Lumber Corporation*, *id.*, p. 306); investment companies (*American Contract and Trust Company*, *id.*, p. 201); real estate companies (*New York State Realty and Terminal Company*, *id.*, p. 270; *Penn-Haven Realty Company*, *id.*, p. 376); leather companies (*Union Tanning Company*, *id.*, p.

has applied its test, and that in the main it has held only affiliates engaged in operations closely related to railroading subject to the Act.

This does not mean that there have not been borderline cases as to which men of good faith have disagreed. With respect to steamship companies owned by railroads and interchanging traffic with them, the Board first held them not subject to the Retirement Act and then, after a contrary position was taken by the Bureau of Internal Revenue under the Carriers Taxing Act, reversed itself. The Social Security Board, which pays benefits to employees not covered under the Railroad Act, was of the view that the shipping companies were not reached by the railroad legislation. In *Allen* v. *Ocean Steamship Co.*, 123 F. 2d 469 (C. C. A. 5) and *Magruder* v. *Baltimore Steam Packet Co.*, 144 F. 2d 130 (C. C. A. 4), it was held that the railroad legislation did not apply, and the Solicitor General did not apply for certiorari.[43] These decisions can

272); railroad car manufacturing and vending companies (*Pullman Standard Car Manufacturing Company*, *id.*, p. 344); chemical companies (*Pennsylvania Salt Manufacturing Company*, *id.*, p. 363); *Michigan Alkali Company*, *id.*, p. 364); toll road companies (*Harbor Island Causeway Company*, *id.*, p. 523); public water supply companies (*Lykens Water Company*, *id.*, p. 553); hotel companies (*Maple Shade Inn, Pulaski, Virginia*, *id.*, p. 260).

[43] To the extent that the courts in those cases regarded the Board's formula as erroneous and adopted the more limited tests here urged by respondent, we think they are incorrect.

stand as law without impairing the validity of the formula which the Retirement Board applies; for even under the Board's test it can be said that such a steamship line's operations are not sufficiently related to those of a railroad to be covered by railroad labor legislation.

In concluding this phase of the argument, a word should be said as to the alternative theory upon which the Board's decision was based—that Duquesne would be subject to the Retirement Act even if that Act reaches only companies engaged in transportation within the meaning of the Interstate Commerce Act. The legislative history of the definition in the Retirement Act, at the very least, indicates that Congress intended to reach activities which were transportation services when performed by the railroad companies themselves, whether or not the carrier performed the service directly or through a subsidiary or controlled contractor. This appears both from Mr. Eastman's statements in the Railway Labor Act hearings (*supra*, pp. 28–30), and the committee reports and other comments on the Retirement Act (*supra*, pp. 31–34). Mr. Eastman found the original definition in the proposed Railway Labor Act amendment inadequate because it would not have reached such contractors or affiliates, and he submitted a revision of the definition which contained the clause as to affiliates, which he admitted was

"new."* The test is not whether a subsidiary would itself be subject to the definition in the Interstate Commerce Act; the object of the new "affiliate" clause was to reach affiliates and subsidiaries which did not come under the older statute. It is thus clear that the Retirement Act goes beyond the Commerce Act at least to the extent of reaching carrier subsidiaries performing services which would be transportation under the Commerce Act when rendered by the railroads themselves. As we show *infra*, pp. 60–68, the Board could properly find that the services performed by Duquesne would have been transportation services if performed by Pennsylvania.

II

THE BOARD'S DETERMINATION THAT DUQUESNE'S WAREHOUSING SERVICES WERE SUBJECT TO THE RETIREMENT ACT SHOULD BE UPHELD

We have shown that the Board's interpretation of the statutory definition as reaching railroad

* See Hearings before Senate Committee on Interstate Commerce on S. 3266, 73d Cong., 2d Sess., p. 146, where the following colloquy occurred after Mr. Eastman had read the proposed definition:

"Mr. EASTMAN. That, I may say, is some of the language in the Interstate Commerce Act.

"The CHAIRMAN. Is there some difference, however? Isn't this reference here to parent, subsidiary, and affiliated, new?

"Mr. EASTMAN. Yes. I am confining this now to the railroad subsidiaries because of the possible conflict with N. R. A. codes if we get into the outside field."

subsidiaries sufficiently functionally and economically related to railroading is a proper one, and that in the alternative the Act was at least meant to reach activities constituting transportation when performed by railroads themselves. The question then arises as to the application of these tests to respondent's warehousing activities.

Where the Board has applied the proper criteria in applying the statute, as we think it has, its decision as to whether a particular factual situation comes within the statutory standard will be accepted by the courts if not arbitrary or unsupported by substantial evidence, or, as it has been more precisely stated, "when there is found to be a rational basis for the conclusions." *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146; *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 513; *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 131; *Gray* v. *Powell*, 314 U. S. 2. The scope of review of the administrative decision is the same whether or not the statute specifically so provides, so long as the administrative body is authorized by Congress to make the determination. Compare *Interstate Commerce Commission* v. *Louisville & N. R. R.*, 227 U. S. 88, 92, and *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177, with *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, and *National Labor Relations Board* v. *Hearst*

Publications, Inc., 322 U. S. 111. And it is immaterial that the question is one as to the application or coverage of the statute (*National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 131; *Gray* v. *Powell*, 314 U. S. 402; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 145–146), or that the underlying facts are not in dispute (*Gray* v. *Powell*, 314 U. S. 402, 412; *United States* v. *Louisville & N. R. R.*, 235 U. S. 314).

There can be no question that the Railroad Retirement Board, upon which is imposed the duty of paying annuities and benefits to employees, or their survivors, has statutory authority to determine which employees are entitled to the payments. That issue of coverage is necessarily involved in every award of annuities or benefits under the Act; and since all coverage is determined by reference to the definition of "employer",[45] the Board must first decide whether the particular employer comes within the statutory definition.[46] The Retirement Act, in providing for judicial review by district courts, empowers the courts to set aside a Board decision if there has

[45] Railroad Retirement Act, Section 1 (b), 45 U. S. C. Sec. 228a (b); Railroad Unemployment Insurance Act, Section 1 (d), 45 U. S. C. Sec. 351 (d). See pp. 71, 76 *infra*.

[46] Section 10 of the Retirement Act (45 U. S. C. sec. 228j (b)) provides that: "The Board shall have and exercise all the duties and powers necessary to administer this Act" and "The Board shall establish and promulgate rules and regulations to provide for the adjustment of all controversial matters arising in the administration of such Act." Section

been "a violation of a legal right." Section 11, 45 U. S. C. Sec. 228k. This expression would appear to have the same meaning as "if not in accordance with law," a phrase used in several other statutes,[47] and as "contrary to law", which was the first statement of what came to be known as the substantial evidence rule in the early Interstate Commerce Commission cases.[48] The Railroad Unemployment Insurance Act specifically embodies the substantial evidence rule (Section 5 (f), 45 U. S. C. Sec. 355 (f)), and the courts have uniformly held that the rule applies in reviewing Retirement Board decisions.[49] These well established principles demonstrate that the finding of the Retire-

11 provides for judicial review of the Board's decisions in the instance of "an employee or other person aggrieved." The Railroad Unemployment Insurance Act provides (Section 5 (b), 45 U. S. C. 355b): "The Board is further authorized to hold such hearings, to conduct such investigations and other proceedings, and to establish, by regulations or otherwise, such procedures as it may deem necessary or proper for the determination of a right to benefits." Section 5 (c) makes express provision for employer participation in proceedings where the employer's status is in issue, and for judicial review. See pp. 72–73, 76–79.

[47] Longshoremen and Harbor Workers Compensation Act, Sec. 21 (b), 44 Stat. 1436, 33 U. S. C. Sec. 921b; Tax Court, Internal Revenue Code, Sec. 1141c (1).

[48] *Interstate Commerce Commission* v. *Louisville & N. R. R.*, 227 U. S. 88, 92; *Interstate Commerce Commission* v. *Union Pacific R. R.*, 222 U. S. 541, 547; *Interstate Commerce Commission* v. *Illinois Central R. R.*, 215 U. S. 452, 470. See Stern, *Review of Findings of Administrators, Judges and Juries*, 58 Harv. L. Rev. 70, 74–76.

[49] *South* v. *Railroad Retirement Board*, 131 F. 2d 748 (C. C. A. 5), certiorari denied, 317 U. S. 701; *Watts* v. *Rail-*

ment Board as to whether a particular employer comes within the statutory standard is binding upon the courts if a reasonable mind might reach the same conclusion.

A. THE BOARD'S FINDING THAT DUQUESNE'S OPERATIONS ARE DIRECTLY RELATED FUNCTIONALLY AND ECONOMICALLY TO THE PERFORMANCE OF PENNSYLVANIA'S RAILROAD TRANSPORTATION AND TO THE RECEIPT, DELIVERY, TRANSFER IN TRANSIT, STORAGE AND HANDLING OF PROPERTY TRANSPORTED BY PENNSYLVANIA BY RAILWAY IS REASONABLE

We think that the Board's finding that Duquesne's warehouses are subject to the statute is

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road Retirement Board, 150 F. 2d 113 (C. C. A. 5); *Ellers* v. *Railroad Retirement Board*, 132 F. 2d 636 (C. C. A. 2); *Taylor* v. *Latimer et al.*, 47 F. Supp. 236 (W. D. Mo.); *Bruno* v. *Railroad Retirement Board*, 47 F. Supp. 3 (W. D. Pa.); *Holloway* v. *Railroad Retirement Board*, 44 F. Supp. 59 (N. D. Ga.); *Despatch Shops, Inc.* v. *Railroad Retirement Board*, 60 F. Supp. 106 (S. D. N. Y.); *Frawley* v. *Latimer*, 57 F. Supp. 276 (D. N. J.); *Morris* v. *Railroad Retirement Board*, D. D. C., Civil No. 10629 (May 9, 1942); *Canfield* v. *Railroad Retirement Board*, D. D. C., Civil No. 14264 (May 4, 1942); *Donahue* v. *Railroad Board*, S. D. Iowa, Central Div., Civil No. 109 (February 21, 1941); *Bray* v. *Railroad Retirement Board*, D. D. C., Civil No. 8211 (January 28, 1941); *Van Natta* v. *Railroad Retirement Board*, D. D. C., Civil No. 4387 (January 9, 1940); *Wing* v. *Railroad Retirement Board*, D. Colo., Civil No. 438 (November 23, 1942); *Welborn* v. *Railroad Retirement Board*, N. D. Ga., Civil No. 2755 (February 27, 1945) (cases without report citations are unreported). As was noted in the Government's brief in opposition in *Utah Copper Co.* v. *Railroad Retirement Board*, 1942 Term, No. 479, pp. 7–9, n., the Circuit Court of Appeals in that case, although reaching the correct decision, did not correctly follow this Court's rulings as to the scope of judicial review in cases involving questions of statutory coverage. See *Nevada Consolidated Copper Co.* v. *Railroad Retirement Board*, 129 F. 2d 358 (C. C. A. 10), certiorari denied, 317 U. S. 687.

a reasonable one, and, therefore, binding upon a reviewing court.

Duquesne's warehouses are located on Pennsylvania sidings in buildings part of which are used by the Pennsylvania itself as freight stations. Indeed, Duquesne merely leases its space from Pennsylvania. Most of the freight stored by Duquesne both comes in and goes out on Pennsylvania rail lines; almost all of it does one or the other. In the East Liberty warehouse all the sugar handled is held under storage in transit for shippers along the Pennsylvania.[50] Less than carload shipments are loaded and unloaded by Pennsylvania; carload shipments by respondent.

In *Baltimore & O. R. Co.* v. *United States*, 305 U. S. 507, this Court described the relationship between railroads and the warehousing services they provide, including storage by subsidiary companies. It was noted that all of the carriers in the New York area " 'now generally store freight on piers owned or leased by them and in warehouses operated by affiliated or subsidiary companies.' This business is carried on in various ways. "Some carriers lease space to shippers for warehousing; others have aided in financing structures on their property in which they lease space

[50] Duquesne also stored paper in transit in its Erie warehouse while that was operating (R. 138). It is not clear from the record whether or not Duquesne stores in transit in its Pittsburgh warehouse. Cf. R. 61 with R. 108 and R. 136–137.

from their own subsidiaries; and still others own directly the buildings and lease them to subsidiaries for warehouse operations." (305 U. S., at 516.) The opinion then goes on to point out the advantages which a railroad may derive from an affiliated warehousing operation (*id.*, at 516–517):

> In all cases the carriers exercise sufficient control over the warehouse facilities to make them subservient to the competitive needs of the carriers. Their entrance into warehousing was brought about by a desire to induce shippers to use particular rail facilities and as first one and then the other of the carriers gained traffic by their warehouse conveniences, it seemed necessary for their competitors to equip themselves with similar advantages. Obviously a shipper, who can secure transportation, storage, handling and insurance together from a carrier and its affiliates for an aggregate cost which is less than the sum for which he can secure the various services when purchased separately from carriers and non-affiliated enterprises, will deal with those offering the best terms. The storage largely determines the transportation route. To get the rail transportation of large shippers, the carriers sought them out and offered warehousing services and space below the rates of private warehousemen and below the cost to the carriers of the services rendered. It was not only a contest between carriers and private warehousemen but also between the carriers themselves.

> Traffic departments of the railroads became solicitors for warehousing business. Favored shippers were rented space by the carriers below compensatory figures.

The *Baltimore & Ohio* case was concerned with the preferences accorded shippers who availed themselves of carrier warehousing, as the above passages point out. But even apart from such advantages, none of which appear in the present records, the very proximity of Duquesne's warehousing facilities to Pennsylvania freight stations and sidings, together with Duquesne's operation by Pennsylvania officials, inevitably benefits Pennsylvania. Cf. *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501; *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U. S. 500; *McCormick Warehouse Co.* v. *Pennsylvania R. Co.*, 148 I. C. C. 299. If that were not so, Pennsylvania would not have gone into the warehousing business to the extent indicated by these and the foregoing cases. Indeed, last Term in *Interstate Commerce Commission and Pennsylvania Railroad Co.* v. *Parker*, No. 507, decided June 18, 1945, Pennsylvania argued (br. pp. 43, 48, 50–54, 62–66) that motor truck operations through a subsidiary could better be coordinated with its railroading functions than if the same operations were performed by an outside firm, and this Court agreed, saying (slip opinion p. 6): "Common management of railroad and trucks gave promise of better co-

operation than would be obtained by arms-length contracts or agreements." We do not think that this observation as to coordination between a railroad and its subsidiaries need be limited to trucking companies.

Other factors in the present record, though not themselves determinative, support the Board's finding as to the closeness of Duquesne's functions to Pennsylvania Railroad operations. Not only are Duquesne's officers Pennsylvania officials, but Duquesne's employees are members of the railroad brotherhood which represents Pennsylvania's own employees, not of the organizations representing warehouse workers not connected with railroads.[51] And Pennsylvania employs Duquesne to dispose of its unclaimed and damaged freight. In undertaking this activity Duquesne is clearly performing a function of the railroad. Such a service might well be one which a railroad would not permit to be performed for it except by a concern which it controlled.

[51] The constitutional jurisdiction of the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees extends only to employees, including storehouse and storeroom employees, of railroad or transportation companies. Peterson, *Handbook of Labor Unions* (American Council on Public Affairs, 1944), pp. 316–317. Warehousemen not connected with railroads are represented by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (*id.*, at 373), the United Retail, Wholesale and Department Store Employees of America (*id.*, at 330), and the International Longshoremen and Warehousemen's union (*id.*, at 202), *inter alia*.

We think these facts demonstrate that Duquesne is performing services covered by the statutory definition. Duquesne receives, delivers and stores property transported by railroad. And the disposal of unclaimed and damaged freight is plainly connected with rail transportation. These activities, by a company completely railroad-owned and controlled, are railroading functions. They are closely related economically to the actual transportation services inasmuch as the existence of Duquesne's storage facilities is undoubtedly advantageous to shippers and enables the railroad to operate its rail systems more successfully.

It is argued by Duquesne that it would be anomalous to hold that where one of two warehouses located side-by-side and similarly operated was owned by a railroad subsidiary and the other was not, the first would be subject to the Railroad Retirement Act and the second to the Social Security Act. This over-simplifies the problem, for there are three, not two, warehousing arrangements to be considered. A warehouse owned and operated directly by a railroad, even though managed in the same way as an independent warehousing company, would be subject to the railroad legislation. The uncontrolled warehouse would not be. A warehousing company owned and controlled by a railroad falls in between. It would be at least as anomalous to differentiate between two warehouses, one directly operated by a rail-

road and the other by a railroad's officials through a subsidiary, as between the latter and an independent company. In the case of *Propriety of Operating Practices—New York Warehousing*, 198 I. C. C. 134, 197 (affirmed in the *Baltimore & Ohio* case discussed *supra*) the Interstate Commerce Commission stated expressly that whether the warehousing facilities are owned and operated directly by the carrier or by affiliated companies "the result is always the same" and that "the substance and not the mere form of the relations should govern." When the operations of the subsidiary are so closely connected with the transportation of property by rail, it is appropriate that they be subject to railroad legislation.

B. THE BOARD'S FINDING THAT DUQUESNE PERFORMED SERVICES FALLING WITHIN THE DEFINITION OF TRANSPORTATION IN SECTION 1 (3) OF THE INTERSTATE COMMERCE ACT IS REASONABLE

The Board's finding, on the alternative theory, that Duquesne comes within the definition in Section 1 (a) of the Retirement Act is also not without a "rational basis" if the definition be given the same meaning as "transportation" in the Interstate Commerce Act.

Loading and unloading.—Duquesne loads and unloads carload freight. Although the carriers generally require shippers to do their own loading and unloading, in return for a lower carload freight rate, loading and unloading undoubtedly is "a part of * * * interstate transportation." *B. & O. S. W. R. Co.* v. *Burtch*, 263 U. S. 540, 544; *Atchison T. & S. F. Ry. Co.* v. *United*

States, 295 U. S. 193, 198;[32] *Adam* v. *Mills*, 286 U. S. 397. Certainly if the carrier had performed the service, whether or not there was an additional charge on the shipper, there would be no question as to its being transportation. *Haberman* v. *Pennsylvania R. Co.*, 234 I. C. C. 167, 173; *Loading and Unloading Carload Freight*, 101 I. C. C. 394. This is sufficient to bring performance of the same service by a carrier subsidiary within the Retirement Act. See pp. 27, 49–50, *supra*.

Storage.—In a series of cases this Court has held that storage performed by a railroad was "transportation" within the meaning of the language now contained in Section 1 (3) of the Interstate Commerce Act. *C. C. C. & St. L. Ry. Co.* v. *Dettlebach*, 239 U. S. 588; *Southern Railway* v. *Prescott*, 240 U. S. 632; *Western Transit Co.* v. *Leslie & Co.*, 242 U. S. 448. These cases held that the limitation of liability in bills of lading approved by the Interstate Commerce Commission precluded application of state laws imposing a greater liability upon carriers for loss of goods stored. Significantly in those cases the goods had been held by the carrier in storage 35 days, 11 days, and "nearly 4 months" before the loss or damage occurred, and in each case it was assumed that "the goods [were] held by the carrier strictly as warehouseman" (242 U. S., at 453) and not as carrier.

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[32] "In the absence of understanding or agreement to the contrary, transportation includes loading and unloading" (295 U. S., at 198).

It will be suggested that these cases relate only to "the involuntary storage of goods incidental to transportation" (*Baltimore & O. R. Co.* v. *United States*, 305 U. S., at 516), which might be regarded as a part of transportation in the strict sense. Although the *Dettlebach* and *Prescott* cases involved goods which the assignee allowed to remain in the carrier station-warehouse for his own convenience after arrival, this was not so in the *Western Transit* case. In that case the contract of shipment provided that the carrier would store the goods in transit for 4 months free of charge, and after that for a stated sum (242 U. S., at 451). Although the financial arrangement differs, such storage in transit is not materially different from that performed by Duquesne in its East Liberty warehouse. In the *Detilebach* case the Court pointed out (239 U. S., at 594) that from the inclusion within the Hepburn Act (now Interstate Commerce Act, Section 1 (3)) of "services in connection with * * * storage * * * of property transported"

> it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned the entire body of such services should be included to-

> gether under the single term "transportation" and subjected to the provisions of the Act respecting reasonable rates and the like.

The Interstate Commerce Commission has often held that storage in transit constitutes transportation under the Interstate Commerce Act. In *Storage at New London & Thamesville, Conn.*, 190 I. C. C. 213, 214, the Commission declared that

> It is well settled that storage in transit comes within the meaning of the term "transportation" as defined in section 1 of the interstate commerce act.

In the companion case of *Storage in Transit at New Haven, Conn.*, 190 I. C. C. 209, 210, the Commission stated

> Storage accorded goods at a point intermediate between the point of origin and final destination of the goods is not a necessary transportation service but it is a transportation service for which a carrier may publish charges in its tariff if the privilege is accorded to all shippers without discrimination. See *Wharfage Handling and Storage Charges*, 59 I. C. C. 488, *Amer. Warehousemen's Assn.* v. *Inland Waterways Corp.*, 188 I. C. C. 13, *Cleveland & St. Louis Ry.* v. *Dettlebach*, 239 U. S. 588, and *Southern Ry.* v. *Prescott*, 240 U. S. 632.

That the definition of "transportation" in Section 1 (3) includes not only the ordinary common carrier obligations of a rail carrier, but also storage

in transit which the carrier chooses to perform was clearly stated by the Commission in *American Warehousemen's Association* v. *Inland Waterways Corporation*, 188 I. C. C. 13, where the Commission said (p. 15):

> It is true that there are certain services, such as warehousing, which, on the theory of the common law, are not common-carrier services and which, in the absence of discrimination, common carriers can not be required to render. Thus in numerous cases we have held that beyond such time as may be required to afford shippers a reasonable opportunity to remove shipments tendered for delivery, storage is no part of the duty of a common carrier; that a carrier is justified, therefore, in imposing such charges for storage as would promote removal of freight from its equipment or premises; and that to that end, it may properly make such charges higher than the actual value of the storage service. *Dakota Monument Co.* v. *Director General*, 59 I. C. C. 101; *Plymouth Coal Co.* v. *D., L. & W. R. R. Co.*, 36 I. C. C. 76.
>
> It is well recognized, however, that there are many things which a carrier may voluntarily do which it can not be required to do, and if it holds itself out to and does render storage service in connection with shipments subject to our jurisdiction such service, although not a service which it could be required to perform, is neverthe-

less included in the term "transportation" as defined by the interstate commerce act. Thus, in *American Paper & Pulp Assoc.* v. *B. & O. R. Co.*, 41 I. C. C. 506, 511, we said:

"In order to prevent overcharges and discriminations under the pretext of additional services, Congress enacted in section 1 that the entire body of such services, many of them, according to the theory of the common law, separable from the carrier's service as carrier, should be included within the single term 'transportation' and be subject to the provisions of the act respecting reasonable rates and the like. And by section 6 no carrier may extend 'any privileges or facilities,' save as these have been duly specified."

This conclusion is supported by decisions of the Supreme Court in *Cleveland & St. Louis Ry.* v. *Dettlebach*, 239 U. S. 588 and *Southern Ry.* v. *Prescott*, 240 U. S. 632, in which it was held in substance that "transportation" as defined in the act includes the service of a carrier as warehouseman in connection with an interstate shipment, although its liability for damage while the goods were warehoused might be for negligence only. As the storage service here under consideration is a facility accorded by the barge line in connection with through barge-rail transportation subject to the act it is included within the term "transportation" as defined by the act.

More recently, and after its decision in the *New York Warehousing* cases to be discussed, the Commission referred to goods stored in transit for as long as two years as "in course of suspended through interstate transportation." *Storage of Cocoa Beans in New York District*, 231 I. C. C. 575, 577.

In other cases the Commission has stated that only storage incidental to transportation came within the definition in Section 1 (3) of the Commerce Act. *Guaranty Claim of the Central Elevator and Warehouse Co.*, 72 I. C. C. 169; *Propriety of Operating Practices—New York Warehousing*, 198 I. C. C. 134, 194–196; 216 I. C. C. 291, 348–349, 220 I. C. C. 102, 103, order upheld *sub nom. Baltimore & O. R. Co.* v. *United States*, 305 U. S. 507. The latter case dealt with a claim that "in transit" warehousing was transportation. The Commission held that the alleged transit services in the particular case, even though so described in the carriers' filed tariffs, "did not invest this storage with the characteristics of storage in transit" (216 I. C. C., at 350), inasmuch as the goods were being held either for further shipment or for sale. "*Bona fide* transit arrangements" were expressly not condemned (*id.*, at 349). The statement by this Court approving the Commission's conclusion that "the in-transit warehousing was not a part of transpor-

tation" (305 U. S., at 525) was, of course, based on the Commission's finding, and must be read as related to the practices claimed by the appellant carriers to be "in transit" warehousing, and not to all *bona fide* transit arrangements.

We have not reviewed these authorities for the purpose of proving that they clearly establish that storage of goods carried by rail is "transportation" within Section 1 (3) of the Interstate Commerce Act, although we think that *bona fide* storage in transit is generally so recognized. But if this be regarded as debatable, we do believe that the authorities cannot be said to establish the incorrectness of, or the lack of rational basis for, the Retirement Board's determination. Certainly the Board's conclusion as to the storage in transit performed by Duquesne can not be regarded as without a rational foundation in the light of the cases discussed, and a substantial percentage of Duquesne's storage operations fall in that category (R. 24).

The authorities indicate that the Interstate Commerce Commission and this Court have properly not been concerned with the formulation of any over-all definition of "transportation" but only with resolving particular problems as they arose. Possibly for some purposes, as in the *Western Transit* case, storage in transit may reasonably be held to be "transportation", while a

different result is reached in other situations when questions of preference are to be resolved. See pp. 42–45, *supra*. Here, if the Interstate Commerce Act definition be assumed to control, the Board must apply this *ad hoc* method of interpreting "transportation" to an entirely different law, or series of laws, which are not designed to regulate the relations between carriers and shippers but those between carriers and certain of their subsidiaries and employees. The object of the definition in these statutes was to reach employees of railroad subsidiaries whose services are so closely related to those which a railroad itself may perform as to justify bringing them within railroad labor legislation. Although the authorities may not have been uniform, they certainly provide a reasonable basis for the Board's conclusion that at least a substantial part of Duquesne's activities would have constituted transportation if undertaken by Pennsylvania directly. This being so, the carrier affiliate clause in the Retirement Act and related statutes warrants the Board in holding that Duquesne comes within the statutory definition.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Circuit Court of Appeals for the Second Circuit in No. 35 should

be reversed and the judgment of the Court of Appeals for the District of Columbia in No. 103 affirmed.

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OCTOBER 1945.

APPENDIX A

The pertinent provisions of the Railroad Retirement Act of 1937, 50 Stat. 307, as amended, 45 U. S. C. Sec. 228a *et seq* are as follows:

DEFINITIONS

SECTION 1. For the purposes of this Act—

(a) The term "employer" means any carrier (as defined in subsection (m) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: *Provided, however,* That the term "employer" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive

power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Board, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "employer" shall also include railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation; and railway labor organizations, national in scope, which have been or may be organized in accordance with the provisions of the Railway Labor Act, as amended, and their State and National legislative committees and their general committees and their insurance departments and their local lodges and divisions, established pursuant to the constitution and bylaws of such organizations. The term "employer" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to an employer where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

(b) The term "employee" means (1) any individual in the service of one or more employers for compensation, (2) any individual who is in the employment relation to one or more employers, and (3) an employee representative.

* * * * *

(m) The term "carrier" means an express company, sleeping-car company, or

carrier by railroad, subject to part I of the Interstate Commerce Act.

* * * * *

DUTIES

SEC. 10. (b) 1. The Board shall have and exercise all the duties and powers necessary to administer this Act and the Railroad Retirement Act of 1935. The Board shall take such steps as may be necessary to enforce such Acts and make awards and certify payments. Decisions by the Board upon issues of law and fact relating to pensions, annuities, or death benefits shall not be subject to review by any other administrative or accounting officer, agent, or employee of the United States.

* * * * *

4. The Board shall establish and promulgate rules and regulations to provide for the adjustment of all controversial matters arising in the administration of such Acts, * * *

* * * * *

COURT JURISDICTION

SEC. 11. An employee or other person aggrieved may apply to the district court of any district wherein the Board may have established an office or to the District Court of the United States for the District of Columbia to compel the Board (1) to set aside an action or decision of the Board claimed to be in violation of a legal right of the applicant or (2) to take action or to make a decision necessary for the enforcement of a legal right of the applicant. Such court shall have jurisdiction to entertain such application and to grant appropriate

relief. The decision of the Board with respect to an annuity, pension, or death benefit shall not be subject to review by any court unless suit is commenced within one year after the decision shall have been entered upon the records of the Board and communicated to the person claiming the annuity, pension, or death benefit. The jurisdiction herein specifically conferred upon the Federal courts shall not be held exclusive of any jurisdiction otherwise possessed by such courts to entertain actions at law or suits in equity in aid of the enforcement of rights or obligations arising under the provisions of this Act or the Railroad Retirement Act of 1935.

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APPENDIX B

The pertinent provisions of the Railroad Unemployment Insurance Act, 1938, 52 Stat. 1094, as amended, 45 U. S. C. Sec. 351 *et seq* are as follows:

DEFINITIONS

SECTION 1. For the purposes of this Act, except when used in amending the provisions of other Acts—

(a) The term "employer" means any carrier (as defined in subsection (b) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: *Provided, however,* That the term "employer" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the gen-

eral steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Board, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "employer" shall also include railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies, and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation; and railway labor organizations, national in scope, which have been or may be organized in accordance with the provisions of the Railway Labor Act, and their State and National legislative committees and their general committees and their insurance departments and their local lodges and divisions, established pursuant to the constitution and bylaws of such organizations. The term "employer" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to an employer where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

(b) The term "carrier" means an express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act.

(c) The term "company" includes corporations, associations, and joint-stock companies.

(d) The term "employee" (except when used in phrases establishing a different meaning) means any individual who is or has been (i) in the service of one or more employers for compensation, or (ii) an employee representative. The term "employee" shall include an employee of a local lodge or division defined as an employer in section 1 (a) only if he was in the service of a carrier on or after August 29, 1935. The term "employee" includes an officer of an employer.

* * * * *

CLAIMS FOR BENEFITS

SEC. 5. (a) Claims for benefits and appeals from determinations with respect thereto shall be made in accordance with such regulations as the Board shall prescribe. Each employer shall post and maintain, in places readily accessible to employees in his service, such printed statements concerning such regulations as the Board supplies to him for such purpose, and shall keep available to his employees copies of such printed statements. Such printed statements shall be supplied by the Board to each employer without cost to him.

(b) The Board is authorized and directed to make findings of fact with respect to any claim for benefits and to make decisions as to the right of any claimant to benefits. The Board is further authorized to hold such hearings, to conduct such investigations and other proceedings, and to establish, by regulations or otherwise, such

procedures as it may deem necessary or proper for the determination of a right to benefits.

(c) * * *

In any case in which benefits are awarded to a claimant in whole or in part upon the basis of pay earned in the service of a person or company found by the Board to be an employer as defined in this Act but which does not comply with the provisions of this Act and denies that it is such an employer, such benefits awarded on such basis shall be paid to such claimant subject to a right of recovery of such benefits. The Board shall thereupon designate one of its officers or employees to receive evidence and to report to the Board on whether such benefits should be repaid. In any such case the Board or the person so designated shall, by publication or otherwise, notify all parties properly interested of their right to participate in the proceeding and, if a hearing is to be held, of the time and place of the hearing. At the request of any party properly interested the Board shall provide for a hearing, and may provide for a hearing on its own motion. The Board shall prescribe regulations governing the proceedings provided for in this paragraph and for decisions upon such proceedings.

Final decision of the Board in the cases provided for in the preceding two paragraphs shall be communicated to the claimant and to the other interested parties within fifteen days after it is made. Any properly interested party notified, as hereinabove provided, of his right to participate in the proceedings may obtain a review of any such decision by which he claims to be aggrieved or the determination of any issue

therein in the manner provided in subsection (f) of this section with respect to the review of the Board's decisions upon claims for benefits and subject to all provisions of law applicable to the review of such decisions. Subject only to such review, the decision of the Board upon all issues determined in such decision shall be final and conclusive for all purposes and shall conclusively establish the rights and obligations, arising under this Act, of every party notified as hereinabove provided of his right to participate in the proceedings.

* * * * *

(f) Any claimant, and any railway labor organization organized in accordance with the provisions of the Railway Labor Act, of which such claimant is a member, may, only after all administrative remedies within the Board have been availed of and exhausted, obtain a review of any final decision of the Board with reference to a claim for benefits by filing a petition for review within ninety days after the mailing of notice of such decision to the claimant, or within such further time as the Board may allow, in the United States district court for the judicial district in which the claimant resides, or in the United States District Court for the District of Columbia. A copy of such petition, together with initial process, shall forthwith be served upon the Board or any officer designated by it for such purpose. Service may be made upon the Board by registered mail addressed to the Chairman. Within fifteen days after receipt of service, or within such additional time as the court may allow, the Board shall certify and file with the court in which such petition has

been filed a transcript of the record upon which the findings and decision complained of are based. Upon such filing the court shall have exclusive jurisdiction of the proceeding and of the question determined therein, and shall give precedence in the adjudication thereof over all other civil cases not otherwise entitled by law to precedence. It shall have power to enter upon the pleadings and transcript of the record a decree affirming, modifying, or reversing the decision of the Board, with or without remanding the cause for rehearing. The findings of the Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive. No additional evidence shall be received by the Court, but the court may order additional evidence to be taken before the Board, and the Board may, after hearing such additional evidence, modify its findings of fact and conclusions and file such additional or modified findings and conclusions with the court, and the Board shall file with the court a transcript of the additional record. The judgment and decree of the court shall be final, subject to review as in equity cases.

* * * * *

APPENDIX C

Section 1, First of the Railway Labor Act, 48 Stat. 1185, 45 U. S. C. sec. 151, First, insofar as here pertinent reads as follows:

> SECTION 1. When used in this Act and for the purposes of this Act—
>
> First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": * * *

APPENDIX D

The pertinent provisions of the Interstate Commerce Act, 49 U. S. C. sec. 1 *et seq.* read as follows:

SEC. 1 (3) (a). The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier." The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person"

as used in this part includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

* * * * * *

SEC. 1 (5) (a). All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

* * * * * *

SEC. 6 (7). No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

* * * * * *

SEC. 15 (13). If the owner of property transported under this part directly or in-

directly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

APPENDIX E

Position of the Social Security Board

The Social Security Board has submitted the following to the Solicitor General as a statement of its position:

The Social Security Board has not concurred in the views of the Railroad Retirement Board regarding the coverage of railroad subsidiaries. It has paid, and is currently paying, benefits based on services for at least forty railroad subsidiaries which the Railroad Retirement Board has held to be covered by the railroad legislation; though expedients have been worked out to avoid duplicate payments in any individual case. The difference of opinion has significance particularly in connection with monthly survivorship benefits, which are payable under the Social Security Act but are not payable under the Railroad Retirement Act. The Social Security Board is paying survivors' benefits based on service falling in this disputed area, while the Railroad Retirement Board is paying retirement benefits (which are normally larger) to workers who reach retirement age.

The Social Security Board takes the position, on the basis of the legislative history of the coverage definition, that Congress intended to confine the railroad legislation to the railroad industry, and not to extend it to segments of other industries, such as water or motor transportation, by reason of the ownership of the stock of companies

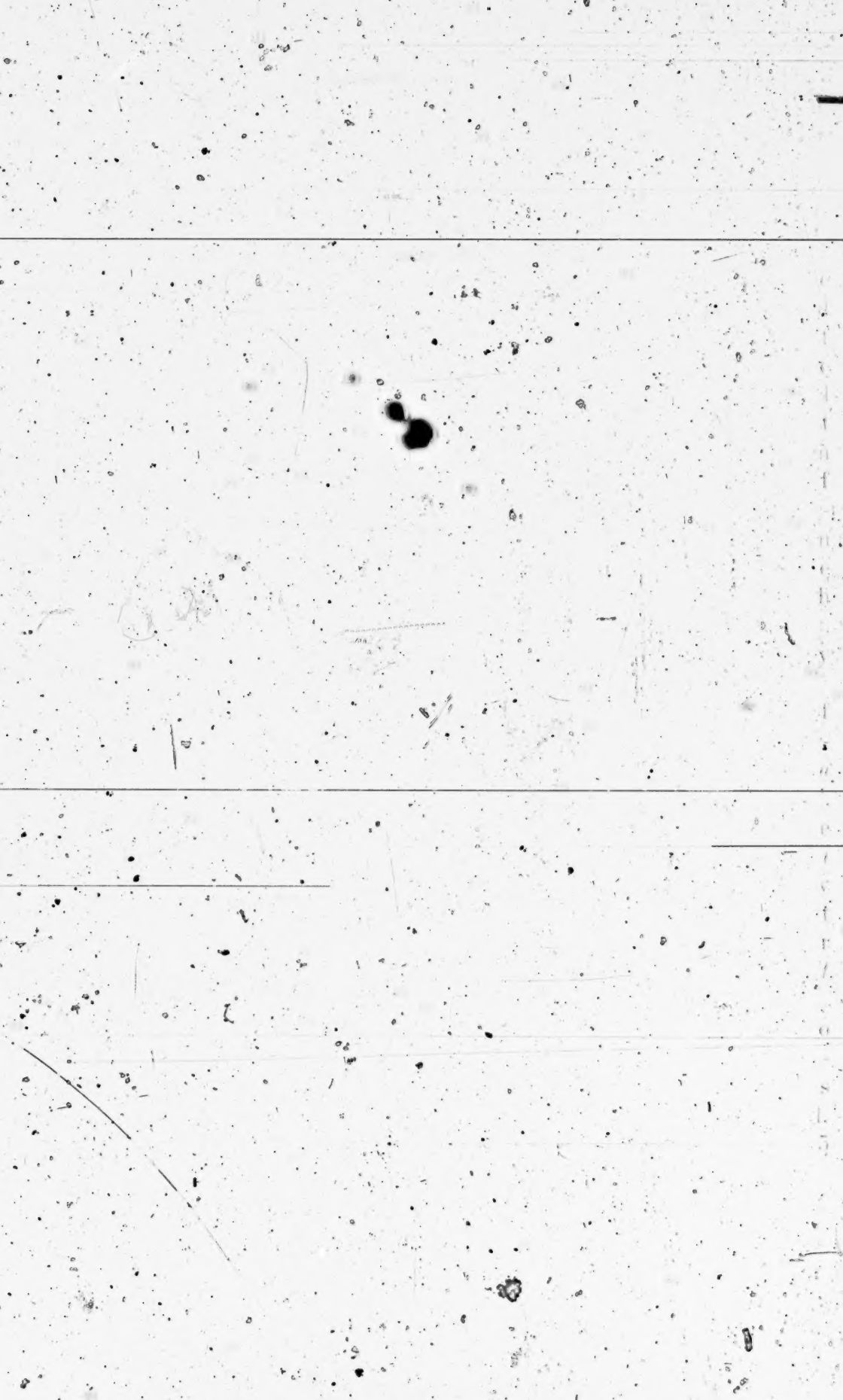
engaged in such activities. That Board believes that the basic intention in framing the coverage definition in the Railway Labor Act amendments of 1934 was to paraphrase the definition of "transportation" in section 1 (3) of the Interstate Commerce Act; and that the only reason for departing in this respect from the original draft, which had in terms referred to the Commerce Act definition, was the objection by the chairman of the Senate committee to a technique of draftsmanship which required reference to another act. (Senate Hearings on S. 3266, 73d Cong., 2d Sess., pp. 10–11, 145–6.) The Social Security Board has recognized that this interpretation cannot be applied rigidly in all cases, and has not applied it in the few instances that have come before that Board in which a railroad company has turned over to a subsidiary a part of the normal railroad operation, such as maintenance of equipment. Its position is that the Congressional intention to cover these occasional cases does not outweigh the evidence that the general rule to be applied in other situations was meant to be that of the Interstate Commerce Act definition.

With respect to the coverage of railroad subsidiaries engaged in the warehousing business, the Social Security Board has assumed that the term "transportation" in the Interstate Commerce Act applies only to those services which the carrier is required by law to perform or which it holds itself out to perform under a railroad tariff. The Social Security Board concedes, however, that if Duquesne's operations are found to constitute such "transportation" services the company is covered by the railroad legislation.

The Social Security Board believes that the criterion of coverage adopted by the Railroad Retirement Board is too indefinite to admit of practical and consistent administration by the many agencies operating the interlocking social insurance systems. It also believes that, at least as applied by the Railroad Retirement Board in the past, that criterion has led to extensions of the railroad legislation into fields—most conspicuously those of water and motor transportation and coal mining—which are not in a proper sense a part of the railroad industry, and to which Congress did not intend the legislation to apply. That Board has, therefore, refused to deny benefits in such cases.

The Social Security Board's interpretation of the act is the same as that adopted by the Circuit Court of Appeals for the Fifth Circuit in *Ocean Steamship Company of Savannah* v. *Allen*, 123 F. (2d) 469, the Circuit Court of Appeals for the Fourth Circuit in *Walling* v. *Baltimore Steam Packet Company*, 144 F. (2d) 130, the majority of the Court below in number 95, reported at 148 F. (2d) 473, and the Federal District Court for the District of Nebraska in *Interstate Transit Lines* v. *United States*, 56 Fed. Supp. 332.

The Social Security Board calls attention to the fact that its decisions are entitled, upon judicial review, to as great a measure of finality as are those of the Railroad Retirement Board. (See Social Security Act, as amended, sec. 205 (g); 42 U. S. C., sec. 405 (g)).



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 95.

RAILROAD RETIREMENT BOARD, BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES, AND GEORGE M. HARRISON,

Petitioners,

v.

DUQUESNE WAREHOUSE COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 103.

DUQUESNE WAREHOUSE COMPANY,

Petitioner,

v.

RAILROAD RETIREMENT BOARD AND BROTHERHOOD OF RAILWAY CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR DUQUESNE WAREHOUSE COMPANY, RESPONDENT IN NO. 95 AND PETITIONER IN NO. 103.

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[illegible]

[illegible]

JOHN SPALDING FLANNERY,
R. AUBREY BOGLEY,
Of Counsel.

OCTOBER 15, 1945.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 95.

Railroad Retirement Board, Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employes, and George M. Harrison, Petitioners,

v.

Duquesne Warehouse Company, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 103.

Duquesne Warehouse Company, Petitioner,

v.

Railroad Retirement Board and Brotherhood of Railway Clerks, Freight Handlers, Express and Station Employes, Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR DUQUESNE WAREHOUSE COMPANY, RESPONDENT IN NO. 95, AND PETITIONER IN NO. 103.

PRELIMINARY STATEMENT.

In the submission of these cases to the Railroad Retirement Board the record in No. 95 was stipulated as the record in No. 103 (No. 103, R. 27-32). It results that the issues here presented have been considered and determined by the Retirement Board and the lower courts in both cases on the same record. And in granting certiorari, this Court directed that the cases be consolidated for argument (No. 95, R. 329; No. 103, R. 88). Hence, this brief is here presented for the respondent in the first case and for the petitioner in the second. And since the record of first instance is that in No. 95, the argument will be directed more particularly to that case.

OPINIONS BELOW.

In No. 95—The opinion of the Circuit Court of Appeals, Second Circuit, was rendered on March 12, 1945, and is reported 148 F. (2d) 473, Judges Chase and Hutcheson, Judge Frank dissenting. This affirmed the judgment of the United States District Court, Southern District of New York—opinion rendered by Judge Goddard and reported 56 F. Supp. 87—which in turn reversed the decision of the Railroad Retirement Board rendered February 11, 1943, holding Duquesne Warehouse Company (hereinafter referred to as Duquesne) to be an employer within the meaning of Section 1 (a) of the Railroad Retirement Act.

In No. 103—The opinion of the United States Court of Appeals for the District of Columbia was rendered on May 14, 1945, Justices Groner, Miller and Arnold, and is reported 149 F. (2d) 507. This affirmed the decision of the Railroad Retirement Board holding Duquesne to be an employer within the meaning of Section 1 (a) of the Railroad Unemployment Insurance Act, and reversed the judgment of the District Court of the United States for the District of Columbia rendered March 2[illegible] 1944—opinion of Bailey, Justice, not reported—which had reversed the decision of the Board.

BASIS FOR JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia sought to be reviewed by Duquesne in No. 103 was entered on June 19, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended (43 Stat. 938; 28 U. S. C. A., Sec. 347), and Rule 38 of the Rules of this Court.

STATUTES INVOLVED.

In No. 95 the action was brought pursuant to Section 11 of the Railroad Retirement Act of 1937, Act of June 24, 1937 (50 Stat. 307); as amended (54 Stat. 264, 785-6; 54 Stat. 1100; 56 Stat. 209).

In No. 103 the action was brought pursuant to Section 5 (c) of the Railroad Unemployment Insurance Act, Act of June 25, 1938 (52 Stat. 1094); as amended (53 Stat. 845-8; 54 Stat. 785-6, 1094-1101; 56 Stat. 210-11). In neither case do the amendments have any bearing on the issues here presented.

The material part of the two statutes is the same. That from the Retirement Act is this:

PART I.

That the Act of August 29, 1935, entitled "An Act to establish a retirement system for employees of carriers subject to the Interstate Commerce Act, and for other purposes"; be, and it is hereby amended to read as follows:

Definitions.

Section 1. For the purposes of this Act—

(a) The term "employer" means any carrier (as defined in subsection (m) of this section), *and any company which is directly or indirectly owned or controlled by one or more such carriers or under*

common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: *Provided, however*, That the term "employer" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Board, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "employer" shall also include railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation; and railway labor organizations, national in scope, which have been or may be organized in accordance with the provisions of the Railway Labor Act, as amended, and their State and National legislative committees and their general committees and their insurance departments and their local lodges and divisions, established pursuant to the constitution and bylaws of such organizations.

* * * * * * *

(m) The term "carrier" means an express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act. (Italics supplied.)

Pertinent also are these provisions from the Interstate Commerce Act, Part I (49 U. S. Code):

Sec. 1. (3)(a) The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire: Wherever the word "carrier" is used in this part it shall be held to mean "common carrier". The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. *The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.* The term "person" as used in this part includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof. (Italics supplied.)

QUESTION PRESENTED.

The question at issue is whether Duquesne, a corporation of the Commonwealth of Pennsylvania which has conducted for over 39 years and now conducts an ordinary commercial warehouse business at Pittsburgh, Pa., is an

employer within the meaning of Section 1 (a) of the Railroad Retirement and Unemployment Insurance Acts. And this in turn depends on whether the warehouses which Duquesne has operated and now operates, or the services which it has performed and is performing are noncasual services "in connection with the transportation of * * * property by railroad, or the receipt, delivery, * * * transfer in transit, * * * storage, or handling of property transported by railroad", as those terms are used in the two statutes in question. Duquesne performs no elevation, refrigeration or icing services.

STATEMENT.

This is a coverage case arising under the Railroad Retirement and Unemployment Insurance Acts, and involves the definition of the term "employer" as found in those statutes. There are three acts where this definition of employer is identical—the Railroad Retirement Act of 1937, the Carriers Taxing Act of 1937 (50 Stat. 435 and now Chapter 9, Subchapter B, (Secs. 1500-1537) Internal Revenue Code), and the Railroad Unemployment Insurance Act. The Retirement Act is the statute pursuant to which annuities and pensions to railroad workers are paid. The Taxing Act is the statute under which the money is collected with which to make those payments. The Unemployment Insurance Act provides benefits in cases of unemployment, for which no such contribution is made by the employe as is the case under the Carriers Taxing Act. Likewise there is almost an identical definition in the Railway Labor Act (48 Stat. 1185) Sec. 1, which is this:

"The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any com-

pany which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad. * * *." (Sec. 1, first.)

Initially the Railroad Retirement Board, which is the administering agent under the Retirement and Unemployment Insurance Acts, instituted a proceeding under the Retirement Act to determine whether Duquesne is an employer under that act. The Retirement Board, consisting of three members, so held—one member dissenting (R. 45-57).* In the United States District Court for the Southern District of New York, Duquesne, pursuant to Section 11 of the Retirement Act, brought an action to set aside this decision of the Retirement Board. Upon request and consent, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express & Station Employes, and George M. Harrison, President of said Brotherhood, were permitted to intervene as parties defendant. Duquesne moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Judgment went for Duquesne. The Retirement Board and the Brotherhood appealed. The Second Circuit Court of Appeals affirmed, one Judge dissenting.

After the determination of the Retirement Act case by the District Judge in the United States District Court for the Southern District of New York, the Retirement Board initiated a similar proceeding under the Railroad Unemployment Insurance Act. By stipulation, the record in the Retirement Act case was made the record in the Unemployment Insurance Act case. The Retirement Board held Duquesne to be an employer within the meaning of

* Refers to record pages in No. 95. Record pages in No. 103 are so noted.

Section 1 (a) of the Unemployment Insurance Act, one member again dissenting. Pursuant to Section 5 of the Unemployment Insurance Act, Duquesne brought an action in the District Court of the United States for the District of Columbia to reverse the final determination of the Retirement Board. Duquesne prevailed. The opinion of Judge Bailey who decided the case is not reported. The Retirement Board and the Brotherhood appealed. The United States Circuit Court of Appeals for the District of Columbia reversed the lower court, Mr. Justice Arnold writing the opinion.

The net result was that in cases involving identical issues and determined on the same record, the two Courts of Appeals rendered conflicting decisions. In the Retirement Act case, No. 95, the Retirement Board and the Brotherhood petitioned this Court for certiorari. Petitioner in the Unemployment Insurance Act case, No. 103, did likewise. This Court granted certiorari in both cases, and ordered that they be consolidated for argument.

The facts before the Retirement Board were not developed by witnesses through question and answer. They were furnished to the Board in answers to two questionnaires (R. 58-59, 103-7), and in two specific statements of fact furnished by petitioner, the latter expressly accepted by the Retirement Board as the facts in the case (R. 108-114, 131-9). In addition, there are two affidavits and their attachments which round out the factual part of the case (178-232). Hence, the cases came before the lower courts and are presented here not on conflicting statements but on facts which are not challenged. Under those conditions the case presents solely a question of law.

Other cases in which this coverage question has been litigated are *Ocean S.S. Co. of Savannah* v. *Allen, Collector*, 36 F. Supp. 851, affirmed 123 F. (2d) 469 (C. C. A. 5, 1941); *Baltimore Steam Packet Co.* v. *Magruder, Collector*, 50 F. Supp. 639, affirmed 144 F. (2d) 130 (C. C. A. 4, 1944), and *Interstate Transit Lines* v. *United States*,

56 F. Supp. 332 (D. C. Nebraska, Omaha Div.). In each case the attempt was made to hold the carrier under the employer coverage provision here involved. In each case the attempt failed. In the case of the Interstate Transit Lines no appeal was taken from the determination of the District Court. Nor was certiorari asked in the first two cases.

SPECIFICATIONS OF ERRORS TO BE URGED IN NO. 103.

The United States Court of Appeals for the District of Columbia acted under a misapprehension of the meaning of the statutes and erred in approving the construction of the two statutes placed upon them by the Railroad Retirement Board, and more particularly in holding—

1. That the services performed by Duquesne are "in connection with" the transportation of property by railroad, or the receipt, delivery, transfer in transit, storage, or handling of property transported by railroad (No. 103, R. 83).

2. That the services performed by Duquesne are services "habitually carried on by railroads as part of their business" (No. 103, R. 83).

3. That the act applies to services rendered in connection with property after railroad transportation has ended or before it has begun, as held by the Railroad Retirement Board (R. 28).

4. That the legislative history of the statute fails to show that the services performed by Duquesne were not intended to be covered by the Railroad Unemployment Insurance Act.

5. That Duquesne is an employer within the meaning of Section 1 (a) of the Railroad Unemployment Insurance Act.

THE FACTS.

The principal statement of the facts, altogether unchallenged, is found at R., pp. 132-139. The exhibits there mentioned appear at R., pp. 168-172. The facts are these:

Duquesne is a corporation of the Commonwealth of Pennsylvania, incorporated August 1, 1906. A copy of its charter is found at pp. 67-8 of the Record. Its only power is that of "conducting a storage and warehouse business." It issues warehouse receipts pursuant to the Warehouse Receipts Act of Pennsylvania—Act of 11 March 1909, P. L. 19. Copies appear in the Record (168-9). It has long been classed in the trade as a warehouseman conducting a commercial warehouse business. During the life of the National Industrial Recovery Act (48 Stat. 195) it was a subscriber to the Code of Fair Competition for the Merchandise Warehousing Trade, and was assigned a specific certificate number under this Code (R. 185, 209, 221). Its stock is owned by The Pennsylvania Railroad Company, hereinafter called Pennsylvania (R. 133).

Its operations are confined to two warehouses, one at East Liberty and the other at Pittsburgh. Both warehouses are owned by Pennsylvania and leased to Duquesne, with the exception of a portion of each building on the ground floor which is retained by Pennsylvania and used and officially designated by it as its freight agency. The railroad company maintains an agency force at each. These stations are fully equipped with tracks and other facilities for the receipt, delivery and handling of inbound freight and outbound, both carlot and less. The operations of each are entirely separate from the operations of the warehouse. Each warehouse has a siding where delivery is made by the railroad company in carlots to the warehouse company. The owner unloads. Duquesne performs the work and charges the owner. On

outbound carload shipments the owner loads on the same siding. The warehouse company does the work and charges the owner. On inbound deliveries and outbound shipments of less than carload freight such delivery and receipt are made and given by the railroad agency at the warehouse. Inbound Duquesne takes the freight from the railroad platform, and outbound delivers it at the railroad platform. It receipts to Pennsylvania inbound, and takes a railroad bill of lading outbound (R. 133-4).

At East Liberty the only commodity handled by Duquesne is sugar in carlots, although the agency of the railroad company at that point is open for the receipt and delivery of all freight, carload and less. The sugar is in packages. It comes into Pittsburgh by rail transportation, originating at the seaboard—New York, Philadelphia and Baltimore. It moves under regular bills of lading of the rail carrier. It is consigned to the owner, a sugar company, care of the Duquesne Warehouse Company. The warehouse company is the consignee. A typical form of such a covering bill of lading appears R. 170. Delivery is made to the warehouse company in placing the car on the siding of the warehouse company. The railroad has then completed its transportation. The freight money is prepaid. The warehouse is used by the owner of the sugar as a distributing point. The packages are assembled in number and size to meet the requirements of the owner's trade. Outbound shipments are made by the owner and in its name. The sugar that went in is the sugar which goes out but assembled differently. A typical bill of lading covering such a movement appears R. 171. Inbound and outbound the sugar is carried by the railroad at carload rates. In the case of inbound shipments the owner unloads the sugar, and on outbound shipments loads the same, the work of unloading and loading being performed by Duquesne for the owner. This loading and unloading by the owner is required by Rule 27, Section 1 of the tariff which governs as to rail trans-

portation, being Consolidated Freight Classification No. 13, and reading as follows, there being no exception as provided in the rule:

> "Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at C. L. ratings or rates, except where the tariff of the carrier at point of origin or destination or stopover station (as the case may be) provides for the loading or unloading of C. L. freight by carrier" (R. 134-5).

While the freight is in the warehouse it is under the exclusive control and direction of the owner. The responsibility of Duquesne in the custody of the sugar is that of a warehouseman. There is no responsibility of the railroad company. All services accorded the sugar, such as loading, unloading, storing, ventilating, drying, moistening, packaging and assembling, are performed by Duquesne at the direction of the owner, and charges for such services are billed by Duquesne against the owner and paid by it (R. 135).

The appropriate tariff of the railroad company carries a transit privilege on sugar in carloads at East Liberty. That is, sugar in carloads transported by the railroad company to consignees at East Liberty may be there delivered to the consignees at the local rates, and if and when subsequently shipped out via the same railroad is entitled to be charged the through rate from first point of shipment to ultimate destination. For instance, assume that the shipment initially moves from New York to East Liberty, is delivered to consignee, is kept in storage there by the consignee for a period of three months, then either the identical sugar or like tonnage is shipped by the consignee to Chicago. Assume further, that the rate from New York to Chicago per 100 pounds

is 90¢, while the rate from New York to Pittsburgh is 50¢, and the rate from Pittsburgh to Chicago is 50¢. On the movement from New York to Pittsburgh the local rate of 50¢ is charged and paid. But on the outbound movement from Pittsburgh, because of the transit privilege, the through rate from New York to Chicago applies, and the shipper pays 40¢ additional only. There, of course, are certain policing rules, primarily to make sure that no more tonnage goes out than comes in. The lower rate is the advantage, and is the chief factor in this transit privilege. The tariff covering the privilege is D. R. R. I. C. C. 100, the pertinent part of which is found at p. 172 of the record. The master tariff of the railroad company carrying the rules governing I. C. C. 100 contains this particular one:

> "While the shipments are stored in transit under these rules their custody and possession as between carrier and the consignee or owner, shall be that of the consignee or owner" (R. 135-6).

The transit privilege of the railroad company is not particular to any one consignee. It is restricted to commodities and locations, but is open to all receivers of those commodities at those points. For instance, transit on sugar is accorded also at Chicago, Detroit, Fort Wayne and Indianapolis; on lumber at Cincinnati, Fort Wayne and Toledo; on dairy products at Cincinnati, Cleveland, Detroit and Indianapolis; on grain at Chicago, Cincinnati, Pittsburgh and St. Louis; and on iron and steel at Ambridge, Pa., Chicago and Logansport, Ind. And at East Liberty the transit privilege is accorded canned food stuffs in addition to sugar (R. 136).

At its other warehouse in Pittsburgh proper, Duquesne also conducts a commercial warehouse business but more diversified as to commodities. The business comes to the warehouse either by rail or by truck, chiefly.

by rail. Such trucking is not local. When coming by rail in carlots and less, the shipments are consigned to the owners care of the Duquesne Warehouse Company as at East Liberty. In the case of carlots, the cars are placed on the siding of the warehouse, and delivery is then and there made to the consignee. Unloading is done by the owner as required by the tariff, the goods being carried at carload rates. In the case of less than carlot shipments the freight is unloaded by the railroad from cars to the platform of the agency, and there delivery is made to the warehouse company by the railroad and appropriate delivery receipt taken. In case of outbound carlot shipments the reverse is the case, the owner loading the shipments and taking from the railroad bills of lading. In less than carload shipments Duquesne delivers the property to the agent of the railroad company at the station, and the railroad company issues its bill of lading, loads the shipment into the car and moves it out. About 40% of less than carlot business moves out by truck" (R. 136-7).

Duquesne sublets parts of the building to tenants who conduct their business there. They are chiefly manufacturing concerns or representatives of manufacturers. Duquesne has nothing to do with any shipments delivered to them or shipped by them. The railroad company treats them the same as any other patrons (R. 137).

Duquesne also at this warehouse receives from the Pennsylvania "freight which has been damaged and refused. At that time Duquesne takes entire possession of the freight, reconditions it, and sells it at private sale. In case the freight proves to be worthless, Duquesne disposes of it. For these services Duquesne charges the railroad company 10% of the gross proceeds of sale, with deductions for any necessary expenses in reconditioning and handling, and remits the balance to the railroad company. This is after the freight has finished its transportation and is turned over to Duquesne for disposal by the

railroad company in a separate and independent transaction." In the handling of that freight under either of the two contracts with Pennsylvania Duquesne has never made delivery to the consignee or owner. Nor has Duquesne under any direction of Pennsylvania ever disposed of any freight which has become so worthless as to become unsalable (R. 137, 178).

Employees of Duquense are on its payroll only, and are paid solely out of its funds. They are hired by Duquesne and discharged by it. They are under no continuing or other authority from Pennsylvania to supervise and direct the manner of rendition of their services, and never have been. They come under the direction of the Superintendent of Duquesne, who has full and unrestricted authority to conduct a commercial warehouse business in accordance with the charter of the company. These employees are not accorded free transportation by Pennsylvania; they are not entitled to become members of The Pennsylvania Railroad Voluntary Relief Department, or of The Pennsylvania Railroad Employes Provident and Loan Association. Membership in the Relief Department is limited to employees or former employees of the railroad company; that in the Provident and Loan Association to employees. They have never been regarded by Pennsylvania as its employees nor by Duquesne as other than employees of that company. Duquesne has paid and is paying taxes under the Federal Social Security Act, Titles VIII and IX, and also makes contributions under the State Unemployment Compensation Law. And it collects from the wages of its employees the tax imposed by Title VIII of the Federal Social Security Act (R. 137-8).

All freight delivered by Pennsylvania to Duquesne or received by Pennsylvania from Duquesne is carried by Pennsylvania at tariff rates which are subject to the Consolidated Freight Classification, Section 1 of Rule 23 of which is this:

"Carriers' agents must not act as agents of shippers or consignees for the assembling or distribution of C. L. or L. C. L. freight" (R. 138).

Duquesne files no tariffs with the Interstate Commerce Commission or any state commission. Nor is it a party to any tariff of any railroad company or other common carrier (R. 138).

In the valuation of property of The Pennsylvania Railroad Company, as required by Section 19 (a) of the Interstate Commerce Act, Part I, by the Interstate Commerce Commission—22. Valuation Reports—these warehouses are not classified as carrier properties (R. 139).

SUMMARY OF ARGUMENT.

1. The words of the statute require that the facilities operated and the services performed by the owned company or affiliate must be "in connection with" property transported by railroad. As will appear in the following pages of this brief, the other defining words such as receipt, delivery, transfer in transit, storage and handling are but descriptive of the words "transported by railroad." Duquesne operates two warehouses in commercial storage. They are not railroad facilities—*Growers Marketing Co.* v. *Pere Marquette R. Co.*, 248 I. C. C. 215. It operates no equipment. Its services are wholly in connection with those warehouses. So the only question here at issue is whether the services which Duquesne performs are "in connection with" property transported by railroad. It is the position of Duquesne that this means while the property is being transported in railroad service, and not before such transportation has begun or after it has ended.

2. The facts of record are not in dispute. They came to the Retirement Board in questionnaires from the Retirement Board answered by Duquesne, in statements of

facts submitted by Duquesne to the Retirement Board, and in affidavits likewise submitted to the Retirement Board by Duquesne. Hence, the case presents solely questions of law.

3. The text of the Unemployment Insurance Act as to coverage is precisely that in the Retirement Act; and the history of the Unemployment Act shows that the coverage in the one was intended to be that in the other.

4. The Railroad Retirement Act was the embodiment of an agreement between management and labor after the decision of this Court in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330 (1935); and should not properly be given a broader scope than was intended by the parties and understood and adopted by the Congress.

5. The two acts were understood and intended to cover the railroad industry and not the warehouse industry, the one having always been separate and distinct from the other.

6. The words "in connection with" as used in the two acts have no application to the services rendered by Duquesne, and this has been ruled by the Retirement Board itself; and such words or similar ones have been given the same construction by the courts in cases relating to transportation.

7. On the undisputed facts the services performed by Duquesne are prior to the commencement or subsequent to the termination of railroad transportation and therefore not within the coverage of the acts.

8. There are set forth answers to some particular points raised by the Retirement Board in its opinion.

ARGUMENT.

I. The Question Here Presented Is Whether The Services Which Duquesne Performs Are "In Connection With Property Transported By Railroad."

To bring Duquesne within the terms of the act there are two separate requirements. The first is that it must be directly or indirectly owned or controlled by an express company, sleeping-car company or carrier by railroad subject to Part I of the Interstate Commerce Act. The stock of Duquesne is owned by Pennsylvania, a carrier by railroad subject to Part I of the Interstate Commerce Act. The other requirement is that Duquesne must perform services "in connection with" the transportation of property by railroad. To meet one requirement is not enough. Both must be present. *Baltimore Steam Packet Co. v. Magruder, Collector, supra.* And it is important to note that while the ownership may be indirect, the performance of services must be direct.

The position of the Retirement Board is that under the facts in this case coverage extends not only to services in connection with the transportation of the property while in the possession of the railroad company, but even before such possession and afterwards (R. 28). If the position of the Retirement Board were carried to its ultimate conclusion it would mean this. A wholesale merchant at Pittsburgh receives via Pennsylvania a carload of flour in barrels. He takes delivery and stores it in his own warehouse. Subsequently he finds that he is running short of laundry bar soap. He has no place of his own in which to store it. But his use for it is more immediate than of flour, so he decides to store the flour with Duquesne. Suppose this is six months after delivery by Pennsylvania to the merchant. Nevertheless, the fact that the flour has once been transported by Pennsylvania would render Duquesne in the transaction subject to the Retirement and Unemployment Insurance

Acts. It would take more compelling language than here found to require this Court to reach result of this kind.

Duquesne asserts the contrary. It is not disputed that each of its warehouses has its own siding, that delivery is made by Pennsylvania when the cars are placed on those sidings, and that railroad transportation is there ended (R. 134). The same is true as to outbound freight loaded in carlots, railroad transportation not attaching until the car is loaded and the bill of lading issued (R. 22). Our position is expressed in this extract from the opinion of Judge Parker in the case of *Baltimore Steam Packet Co.* v. *Magruder, Collector, supra:*

> "* * * If additional light were needed as to the meaning of the phrase, 'service in connection with', as used with transportation by railroad in the statute, it is furnished by the succeeding words 'or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad.' *Noscitur a sociis.* Clearly what was intended was to cover subsidiary carporations of railroads that render *services while the transportation by railroad is in progress or services that the railroads are under obligation to render for the rates that they charge.* It would be giving a forced and unnatural construction to the language to hold it applicable to water transportation merely because such transportation precedes or follows transportation by rail in the course of interstate movement. * * *" (p. 133). (Italics supplied.)

The word "transported" is a passive participle equally applicable to the present as to the past tense. And it will appear from the following pages of this brief that both the courts and the Interstate Commerce Commission have always applied the word "transported" as meaning while the property is in the course of railroad transportation.

II. Since The Facts Are Not In Dispute, The Issue Is One Of Law For Determination By The Court.

A. The Case is One of Coverage.

The construction placed upon the statute by the Retirement Board is this:

> "In light of the general purpose of the Railroad Retirement Act and accepted doctrines of statutory construction, the Board has construed the carrier affiliate coverage provision as denoting services which are an integral part of, or are closely related to, the rail transportation system of a carrier and as including within its coverage (1) carrier affiliates engaged in activities which are themselves railroad transportation or which are rendered in connection with goods in the process of transportation, such as loading and unloading railroad cars, receipt, delivery, transfer in transit, and other handling of property transported by railroads; and also (2) carrier affiliates engaged in activities which enable a railroad to perform its rail transportation, such as maintenance and repair of way and equipment, and *activities which enable a railroad to operate its rail system more successfully* and to improve its services to the public, such as auxiliary bus transportation, dining facilities, and incidental warehousing services" (R. 31-32). (Emphasis supplied.)

This divides into (1) services performed while the goods are in the process of railroad transportation, and the loading and unloading of cars is given as an example; and (2) services which are said to enable a railroad to operate its rail system more successfully and to improve its services to the public, such as warehousing services. As to (1), the loading and unloading of cars is rail transportation when performed by the rail carrier or by others for it as part of its transportation service, but it is not

service in rail transportation when performed by a consignee or owner, or by another at the instance of consignee or owner. Under the governing tariff here (R. 135) Pennsylvania could not unload and can not unload without violating its tariff (R. 135). *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 510.

The other element of the Board's construction that the coverage includes services of an affiliate which enable a railroad to operate its rail system more successfully and to improve its services to the public is so exceedingly broad as not to merit further discussion. In so far as we are aware, no authoritative body other than the Retirement Board has approved any such expansion. Such an extension would certainly place the Railroad Retirement Account in much greater actuarial deficiency than exists today. This insolvency is covered more fully at p. 34 of this brief.

In No. 103 the Court of Appeals below approved of this construction by the Retirement Board. And it went further in holding that the operations under consideration here are those habitually carried on by railroads as part of their transportation service (No. 103, R. 83). In support of its position it relied upon *Baltimore & Ohio Railroad Co.* v. *United States*, 305 U. S. 507, 516-17. That case resulted from the decisions of the Interstate Commerce Commission as found in 198 I. C. C. 134, 216 I. C. C. 291, and 220 I. C. C. 102. What the Commission in those cases condemned was certain practices of certain carriers in the New York territory which come within the definition of commercial storage. And in doing so it is important to note here that the Commission defined "transportation" under the Interstate Commerce Act as follows:

"The term 'transportation' as used in section 1 (3) of the act includes the receipt, delivery, elevation, and transfer in transit, ventilation, refrigera-

tion or icing, storage and handling of property transported. Under section 1 (4) it is made the duty of every common carrier subject to the act engaged in the transportation of property to provide and furnish such transportation upon reasonable request therefor. While storage of property is clearly within the transportation service which carriers are obligated to furnish, their duty under these provisions extends only to that storage which is necessarily incidental to transporting such property. To be incidental business, the storage must be preliminary either to immediate transportation or immediate removal. *State* v. *Southern Pac. Co.*, 52 La. Ann. 1822; 28 So., 372; *Guaranty Claim of Central Elevator & Warehouse Co.*, 72 I. C. C. 169. * * *"

Propriety of Operating Practices—New York Warehousing, 198 I. C. C. 134, 194-5.

This Court in *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, has held that "The Commission is clearly empowered to determine what is embraced within the service of transportation and what lies outside that service" (p. 408).

In the record before the Court there is nothing to the effect that the services of Duquesne are those condemned in the three I. C. C. cases. In fact Duquesne is doing exactly what the Commission commended in the three above cases. Hence, in deciding this case the Retirement Board acted under a misapprehension as to the meaning of the statute. The Court of Appeals below did likewise, and in addition misconstrued the decision of this Court in *Baltimore and Ohio Railroad Co.* v. *United States, supra.* And because of a similar situation, this Court has lately reversed this same Appellate Court in this language:

"Since the Court of Appeals considered irrelevant the jurisdictional test which we find to be imposed by Congress, the inquiry on review has not proceeded under a correct rule of law and it follows that the judgment of the Court of Appeals must be reversed."

Connecticut L. & P. Co. v. *Federal Power Commission*, ... U. S. ... (Jan. 3, 1945).

B. The Facts are not in Dispute.

The Board chose to handle this case by a submission of facts and not at oral hearing. First, a questionnaire was submitted by the Retirement Board to Duquesne and answered by it (R. 58, 99). The wording of the questionnaire was not sufficiently clear to be fully understood, and so the answers could not accurately cover the inquiries. The District Court in No. 95 thought so also (R. 287). Meanwhile an entirely new form of questionnaire had been devised by the Retirement Board. This Duquesne answered and filed with the Board by way of substitution with an accompanying letter (R. 103). Then followed a statement of facts in more detailed form submitted by Duquesne and accepted by the Board (R. 108-110). And finally, in order that the record might be quite complete, a statement of facts, not differing from the previous one but much more extended, was filed with the Board and accepted by it under the terms of a letter reading as follows:

"In response to your letter of the 3rd ult. in this proceeding, time subsequently extended in your favor of the 22nd ult., I beg to say that enclosed herewith you will find statement of facts and memorandum of law in support of the position of the warehouse com-

pany that it is not an employer within the terms of the Railroad Retirement Act. The facts appearing in the statement of facts can be substantiated by competent proof. It is accordingly requested that this statement of facts be made a part of the record in this proceeding. If the Board, however, is not willing to accept this statement of facts as the facts in the proceeding, then it is requested that before any ruling be made by the Board or order entered by the Board which may be adverse to the position taken by the warehouse company, a hearing be had to the end that a complete record in stenographic form may be had in the proceeding." (R. 130-131.)

Two affidavits of consequence with their exhibits (R. 178-232) complete the undisputed facts, which as such present a question of law for determination by the Court. *Farmer* v. *Commissioner of Internal Revenue*, 126 F. (2d) 542, 543 (C. C. A. 10, 1942); *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 373, 376; *Baltimore & Ohio Railroad Co.* v. *United States, supra*, at p. 515.

We do not except to all the findings of the Board. The underscored portions appearing in the Appendix are those which are here challenged. It will immediately be seen that those findings are arbitrary because grossly contrary to the undisputed facts. At best they are not more than erroneous conclusions covered in fact apparel. As such they come within the well settled rule that "Where facts found are mere conclusions from undisputed testimony, they are given no greater weight than findings of law." *Commercial Motors Mortgage Corp.* v. *Waters*, 280 Pa. 177, 180-1, 124 Atl. 327; *Fidelity Trust Co.* v. *Union National Bank of Pittsburgh*, 313 Pa. 467, 471, 169 Atl. 209, certiorari denied 291 U. S. 680; *Fidelity-Philadelphia*

Trust Co. v. Lehigh Valley Coal Co., 294 Pa. 47, 54, 143 Atl. 474; *Barrows v. Fuller*, 253 Mass. 79, 148 N. E. 374, 375.

III. The Text Of The Unemployment And Retirement Acts As To Coverage Is Identical; And The History Of The Unemployment Act Shows That The Coverage Of The Former Was Intended To Be The Same As That Of The Latter.

The Unemployment Act was drafted by the labor representatives themselves.* The same bill was before both the House and Senate Committees, H. R. 10127 and S. 3772, Seventy-fifth Congress, Third Session, May 26 and June 3, 1938. The following extracts from the testimony shows that the coverage was intended to be precisely that under the Railroad Retirement Act:

"1. *Coverage.*—Identical with that of Railroad Retirement Act of 1937, viz, interstate railroads, certain of their operating subsidiaries, sleeping-car and express companies, traffic and similar associations

* "About 2 years ago the Railway Labor Executives' Association began to work on this type of protection against the increasing hazard of unemployment, and discussed the problem with the Association of American Railroads. We had a bill drafted along the general lines of State unemployment compensation laws. It was probably a good bill but we couldn't understand it. It was too complex. Under it, as under the present State laws, no worker would ever really understand his rights. So we appointed a subcommittee of Railway Labor Executives' Association to study the subject primarily with a view to simplification. We had several different bills drafted one after another. They were studied by our subcommittee and the chiefs of the railway labor organizations, until finally we arrived at the present bill, which we believe to be the simplest and soundest bill for unemployment insurance ever introduced into any legislature in this country."

(Cashen, President, Switchmen's Union and Chairman Unemployment Insurance Committee, Railway Labor Executives Association. House Hearings, pp. 21-2, on H. R. 10127. Same statement, same witness, Senate Hearings, p. 18, on S. 3772. Seventy-fifth Congress, Third Session, May 26 and June 3, 1938.)

maintained by the railroads, and railroad labor organizations."

(Cashen, President, Switchmen's Union, and Chairman Unemployment Insurance Committee, Railway Labor Executives Association. House Hearings, p. 16. Same statement Senate Hearings, p. 22.)

"In the first place we provide that the coverage of this act shall be identical with the coverage of the Railroad Retirement Act; that is to say, *it applies, speaking briefly and in summary, only to men who in some capacity or other are engaged in the operation of the country's railroad system.* In the second place, it applies in the contribution or taxing side to identically the same tax base as is carried in the carriers' taxing act." (Emphasis supplied.)

(Hay, Counsel for Railway Labor Executives Association, House Hearings, pp. 29-30. Similar statement Senate Hearings, p. 27.)

This is from the Senate Committee report on S. 3772:

"EXPLANATION OF THE BILL

Section 1. Definitions

* * * * * * *

"As stated above, it is the purpose that the proposed act have the same coverage of employers and employees as the Railroad Retirement Act. For this purpose, the definitions of the terms 'employer,' 'carrier,' 'company,' and 'employee representative' (subsecs. (a), (b), (c), (e) are the same as in the Railroad Retirement Act. * * *"

(Senate Report, p. 3. Same statement House Report on H. R. 10127, p. 3.)

IV. The Retirement Act Is The Embodiment Of An Agreement Between Management And Labor With Respect To Pensions And Annuities For Railroad Workers; It Was Sanctioned By Congress Through Legislative Enactment; And Should Not Be Extended Beyond The Clear Intent Of The Parties As Understood And Adopted By The Congress.*

The development of the history of the present Railroad Retirement Act really begins with the Transportation Act, 1920,† Act of February 28, 1920, Title III, c. 91 (41 Stat. 456). That Act established a plan for the settlement of disputes between carriers and their employes and subordinate officials. In 1926 the Railway Labor Act (44 Stat. 577) was passed, which repealed Title III of the Transportation Act. The Railway Labor Act was amended substantially in 1934 (48 Stat. 1185) giving the definition of "employer" as we now have it.‡ It is practically the same as the definition in the Retirement and Unemployment Insurance Acts. And while the Railway Labor Act as thus amended has been in effect for over eleven years, no one has ever claimed that Duquesne is subject to it.

In the passage of the Railway Labor Act of 1934 through the Congress, the bill before the Senate Committee

* At this point it is not inappropriate to bring to the attention of the Court that there are now pending before congressional committees two identical bills which would by legislative enactment so amend the two acts involved in these cases as to extend the coverage not only to the extent here sought by the Retirement Board but very much beyond. One member of the Retirement Board is not in accord. The bill in the Senate before the Interstate Commerce Committee is numbered S. 293, and that in the House before the Interstate and Foreign Commerce Committee, H. R. 1362—paragraphs (2), (4) and (5) of Section 1 (a), pages 2-4. Hearings have been concluded before the full House Committee, and also before a subcommittee of the Senate Committee. Both bills are being vigorously opposed by carriers, warehousemen and other.

† The Erdman Act, of June 1, 1938 (30 Stat. 424), and the Newlands Act, of July 15, 1913 (38 Stat. 103), are not material to this discussion.

‡ Except that by a further amendment of 13 August 1940 (54 Stat. 785) coal miners were excluded. This amendment was also carried into the Retirement and Unemployment Insurance Acts.

was S. 3266 (73rd Congress, 2nd Session). In so far as material here, the definition of the term "carrier" was this:

> "The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, any company operating any equipment or facilities or furnishing any service included within the definition of the term 'railroad' and 'transportation' as defined in the Interstate Commerce Act, * * *." (Section 1, First.)

Mr. Eastman, then Federal Co-ordinator of Transportation, was the sponsor of the bill. Speaking to the scope of the measure, he said this:

> "In the paragraph of section 1 marked 'First', there is a change in the present definition of the term 'carrier.' This change is intended to bring within the scope of the act operations which form an integral part of railroad transportation, but which are performed by companies which are not now subject to the Railway Labor Act. The most important illustration is found in the refrigerator-car companies, which own refrigerator cars operated by the railroads and perform certain functions connected with refrigeration service. Another illustration is found in the companies to which railroads have on occasion contracted out their maintenance work on equipment and even on way and structions. The thought is that concerns which function in this way as *an integral part of the railroad transportation system* should be subject to the same duties and obligations with respect to labor controversies as the railroads themselves and as the express and sleeping-car companies. This object is attained by including in the definition of 'carrier' any company 'operating any equipment or facilities or furnishing any service included within the definition of the terms "railroad" and "trans-

portation" as defined in the Interstate Commerce Act. Perhaps a better way can be found of accomplishing the desired result, but it was thought that this language would serve the purpose" (pp. 10-11). (Emphasis supplied.)

On a subsequent day, 18 April 1934, and before the same committee, his testimony was this:

"MR. EASTMAN:—I shall discuss, first, the amendments to S. 3266 which have been proposed by the railroads.

"Section 1, paragraph first: The railroads wish to strike out the words 'any company' in line 10 of page 1. This amendment would confine the bill to the employees of express companies, sleeping-car companies, and railroads. It would eliminate companies, like refrigerator-car companies, which operate facilities or furnish service forming a part of railroad transportation. Most of the illustrations given by Mr. Clement to support his objections to the words 'any company' relate to construction work. The language in the bill would not cover outside companies engaged in such work for the railroads, as I read it. He is right in believing that it would cover trucking companies performing terminal service for the railroads. However, he approves of the wording of the present act, and that includes 'other transportation facilities used by or operated in connection with any such carrier by railroads'. It is plainly broad enough to cover terminal trucking.

"THE CHAIRMAN:—As I recall it, he claimed that it would affect their building of bridges and affect their contracts for all kinds of work. Is that your understanding of the definition?

"MR. EASTMAN:—Well, as I read the definition of the bill, as I have said here, I do not think it would cover such construction work. However, I am about to propose an amendment.

"While I believe that the railroad objections are largely without basis, the chairman has made a valid criticism of the definition of 'carrier' now in the bill, because it requires reference to another act. I can also see difficulties in bringing in trucking operations and certain other operations performed for railroads by outside companies, because of possible conflicts with N.R.A. codes. It is difficult to know just where to draw the lines. I am inclined to believe that for the present it would be well *not to go beyond carriers and their subsidiaries engaged in transportation.* So changed, the definition would read:

> 'the term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad.'

"That, I may say, is some of the language in the Interstate Commerce Act" (pp. 145-6). (Emphasis supplied.)

In the House the companion bill was H. R. 9689. Mr. Eastman, again testifying on 22 May 1934, said this:

> "COMMISSIONER EASTMAN:—Well, that is the bill that I will talk about this morning. This bill does not depart from the general principles of the present Railway Labor Act, but instead is designed to reinforce those principles and provide for their more effective application. It seeks not to overturn but to perfect what has been done.

"I call attention in the first place to the fact that section 1 contains definitions. The present Railway Labor Act contains a definition at the outset of the term 'carrier', which has been subject to some doubt. I do not think it has ever been fully decided just what is covered by the definition of 'carrier' in the act as it now stands. In this bill, H. R. 9689, the definition provides that the term 'carrier' shall include any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act; and then does further and includes

> any company which is directly or indirectly owned or controlled by, or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier".'

"Now, summing that up, it includes with those carriers subject to the provisions of the Interstate Commerce Act, *i. e.*, all railroad companies and express companies and sleeping-car companies, and all companies which are directly or indirectly owned or controlled by the railroads and which perform service or furnish facilities in connection with transportation service performed by the railroads, and the definition includes words descriptive of such transportation service which are taken from the provisions of the Interstate Commerce Act" (pp. 16, 17).

The next step is to the Retirement Act. There have been three such acts. The first was that of June 27, 1934 (48 Stat. 1283). It foundered on the constitutional issue—

Railroad Retirement Board v. *Alton R. Co.*, 295 U. S. 330. There the defining words in so far as material here were these:

> "The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation of passengers or property or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad. * * *"

The second act was that of August 29, 1935 (49 Stat. 967). There was a companion Taxing Act (49 Stat. 974). They met no better fate.—*Railroad Retirement Board* v. *Alton R. Co.*, 16 F. Supp. 955. The defining words covering "carrier" (employer) were the same as in the first act.

The third act is the present one. It was not framed in the usual way by the draftsmen of Congress. Its terms were agreed upon by the parties—labor and management—and its text was constructed accordingly.* It is

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* Mr. George M. Harrison, testifying for the employes in support of the present Retirement Act, told the story of its inception and drafting in the following language:

"In view of that litigation and the uncertainty of the future of the legislation the President of the United States wrote a letter to the representative of the railways and also to myself in the month of December 1936 and suggested, in view of the many efforts that had been made to pass railroad retirement legislation, and the resulting legal controversies, that he would suggest that the railways and the representatives of the workers undertake to consider the subject of retirement legislation in conference and see if they could reach an agreement on retirement legislation. Then the President made available to us, should we accept his suggestions, the staff of the Railroad Retirement Board for purposes of assisting in determining the various matters that necessarily would have to be considered in the development of any legislation providing for a system of retirement benefits for railroad workers. Both the railway management and the representatives of the labor

not a statute of general railroad social insurance. It was intended to provide pensions* for railroad workers, under specific limitations. For instance, coverage is restricted to certain parties (Sec. 1 (a)). Retirement is at certain ages measured by years of service, tempered in the named instances by regard for physical disability (Sec. 2). The amount of pension is calculated under expressly designated formulas (Sec. 3). In certain cases there is a cutback. In the framework of the act two cardinal principles of life insurance are ignored—age and physical fitness. It was apparent then and is apparent now that any extension of coverage not specifically within the terms of the statute will entail a heavy backlog of actuarial liability.

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organizations accepted the President's suggestion and conferences got under way in Washington on the 7th day of January 1937. Those conferences continued with some degree of regularity, although intermittently, until the 18th day of February, at which time the representatives of the two groups reached an agreement, and that agreement resulted in the preparation of the bill which is now under consideration by your honorable committee.

* * * * * * * *

"Now, as I said in the beginning, I give you that development, because the bill now before your committee is the product of long consideration by the respective committees representing railway management and railway labor. In fact, it is an agreement between the two groups on railroad retirement legislation. So we appear in support of the bill by way of saying to the committee that the bill represents an agreement between the two parties, railway labor and railway management, the latter represented by the Association of American Railroads, representing substantially all of the railroad mileage of the country, and the former by the Railway Labor Executives' Association, embracing all of the standard railway labor unions, and representing substantially all of the approximately 1,150,000 railway workers in the United States."

(Testimony of Mr. Harrison before the Committee on Interstate and Foreign Commerce, House of Representatives, 75th Congress, 1st Session, on H. R. 6956, pp. 10-11. See also to the same effect testimony of same witness before the Committee on Interstate Commerce, United States Senate, 75th Congress, 1st Session, on S. 2395, pp. 10-11; and testimony before Committee on Ways and Means, House of Representatives, 75th Congress, 1st Session, on H. R. 6448—Carriers Taxing Act of 1937, pp. 5-6.)

*In the case of those employees who were on the pension rolls of the individual companies on July 1, 1937, the payments are called pensions. In all other cases they are called annuities. (Sec. 6.)

The companion Taxing Act provides the money for the payment of pensions. Its rates were calculated on carrying the load on what are commonly known and recognized as railroad workers. And it may not be amiss to note at this point that those rates have not proven sufficient to adequately carry that load. In other words, the Railroad Retirement Fund at the moment is actuarially insolvent. The Retirement Act, Sec. 15 (d), requires an actuarial survey to be made at intervals of not longer than three years. Two such surveys have been made. The first one found the fund inadequate. And the last one estimates that by the year 1955 there will be no reserve—Annual Report Railroad Retirement Board, 1943, p. 119.

Under these circumstances the intent can best be gathered from an examination of the testimony of the witnesses who sponsored the respective bills before the committees of the two houses of Congress. It is particularly to be noted that Mr. Harrison, one of the defendants in No. 95, but omitted as such in No. 103, represented not only labor interests but spoke also for the carriers, since the parties were in agreement.* At the beginning of his testimony before the House Committee on H. R. 6956, 75th Congress, 1st Session, the following direct question was asked and answer given:

> "MR. WOLVERTON:—Does the act consider ferry companies as a part of transportation systems?
>
> "MR. HARRISON:—If such ferry is operated by the railroad company and is a ferry which is engaged in transporting passengers and property *as a part of the railroad transaction;* yes" (p. 16). (Emphasis supplied.)

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*"MR. FLETCHER:—Mr. Chairman and gentlemen of the committee, my name is R. V. Fletcher, and I am with the Association of American Railroads.

"I am spared the task of making an extended statement by reason of the very full analysis of the bill which has been presented to the committee by Mr. Harrison, who spoke, insofar as an explanation of the bill is concerned, not only for the group which he immediately represents but for railroad management as well." (Hearings H. R. 6956, p. 82.)

Further testifying at the same hearing Mr. Harrison said this:

"Now section 1 might be referred to as the scope of the legislation. Section 1 makes the bill applicable to those that are defined in that section as employers. Now the employers defined in section 1 are express companies, sleeping-car company, or carrier by railroad that are subject to part 1 of the Interstate Commerce Act, and in addition thereto it is proposed to include as employers any company which may be directly or indirectly owned or controlled by the express company, the sleeping-car company, or railway company, or under common control by one or more of such companies, when those companies are engaged in the business of transporting passengers or property for the railroad, or other *service that is a part of railway transportation,* such as grain elevators, private car lines, refrigerator car companies, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of these previously identified employers which are, express companies, sleeping-car companies, or carriers by railroad." (Emphasis supplied.)

* * * * * * *

"Now, the language used thus far, as explained by me, is the same language, I think it could be said, that has been incorporated in the Railway Labor Act; that was incorporated in the previous railroad retirement legislation. But at that point now we expand the application of this legislation as compared to the present law.

"We include such joint associations as may be formed or operated by two or more railway companies. For example, they have joint agencies that are engaged in the collection of freight bills, used as

a clearing house, make deposits of funds that are collected. The agency is supported by the member railways. They have joint passenger agencies and ticket associations that are operated and supported by the railways. They have inspection and weighing and demurrage bureaus operated by the railroads. The railroads have joint organizations dealing with labor matters for railway management, and they have a joint association known as the Association of American Railways. All these joint agencies that are performing service which is incidental to railroad transportation and supported in whole or in part by the railroad companies are included as employers.

"We further expand the application of the proposed legislation by including the 21 standard railway labor unions that represent the employees, and we make the railway labor unions, for the purposes of the act, employers. In the international headquarters of these various labor unions we have a staff of clerks, clerical employees and officers, and they will be given the benefit of this proposed legislation in just the same manner that they would if they were working for a railroad company. The railway unions will be the employers, exactly the same way as the railroad companies will be employers". (pp. 17-18).*

*The phrascology was finally worked out in this way:

"MR. HARRISON:—I would like to offer an amendment on page 2 of the bill. Strike out lines, 3, 4, 5, 6, 7, 8, and the words '(other than trucking service)' in line 9 and insert in lieu thereof the following——

"MR. HALLECK:—That is on page 2?

"MR. HARRISON:—Yes, sir; page 2, lines 3 to 8, both inclusive, and the words in parentheses 'other than trucking service' in line 9.

"And insert in lieu thereof the following:

"(a) The term "employer means any carrier (as defined in subsection (m) of this section), and any company which may be directly or indirectly owned or controlled by one or more of such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities)'." (H. R. 6956, p. 134. Same change in Senate Report on S. 2395, p. 4.)

Before the Senate Committee on S. 2395, the same witness said this:

"Mr. Harrison:—In offering these amendments, I should like to say that the amendments have been agreed to by the railway management, by railway labor, and by the Treasury of the United States. We have inserted the amendments in the proper places, and we have enough corrected copies of the bill to distribute to five or six of the members of the committee.

"The first of these amendments is as follows: On page 2, paragraph (a), strike out lines 3, 4, 5, 6, 7, and 8, and also strike out the words 'trucking service' on line 9; and in lieu thereof, substitute the following [reading]:

"(a) The term "employer means any carrier (as defined in subsection (m) of this section) and any company which may be directly or indirectly owned or controlled by one or more of such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities).'

"The Chairman:—What is the meaning of 'casual'?

"Mr. Harrison:—Well, the railways occasionally employ a contractor to repair a depot or to build a bridge, or do some other work for them that ordinarily is carried on by the railway force. In that instance, we would not undertake to take in the force of the contractor, just because those men were doing occasional work for the railroad company.

"Senator White:—These are services that are not ordinarily performed by the railroad company or by its employees?

"Mr. Harrison:—That is true.

"THE CHAIRMAN:—Does this include busses operated by the railroads?

"MR. HARRISON:—No. If the bus is *operated by the railroad as a part of its transportation*, then the workers on the bus would come under the proposed law. However, if there is a subsidiary bus or truck company, then it is subject to part II of the Interstate Commerce Act; and this bill applies only to part I of the Interstate Commerce Act—'such common carriers as are subject to part I of the Interstate Commerce Act.' and they are—

> 'any express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act, and any company which may be directly or indirectly owned or controlled thereby or under common control therewith, and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad.'

"*In other words, part of the railroad plant*" (p. 11). (Emphasis supplied.)

This is from the same witness before the House Committee on Ways and Means on H. R. 6448, Seventy-Fifth Congress, First Session, which became the Carriers Taxing Act of 1937:

"The bill, H. R. 6448, that is now under consideration, levies an excise tax on certain employers and those employers are defined in section 1 of the bill.

"Briefly, they are all common carriers by railroad subject to the Interstate Commerce Act; express

companies that are subject to title I of the Interstate Commerce Act, and such other companies as are directly owned or controlled by the railway companies and engaged in the business of transporting passengers or property. In addition thereto the national rail labor unions.

"MR. CULLEN:—That would relate to bus companies, too, would it not?

"MR. HARRISON:—No. They are not subject to part I of the Interstate Commerce Act. They are subject to part II.

"MR. CULLEN:—Do not some of the railroads own bus lines that carry passengers?

"MR. HARRISON:—Railroads own them, you say? No; they are subsidiary corporations and they are regulated by title II of the Interstate Commerce Act.

"MR. KENT:—Is it not any company that is directly or indirectly owned or controlled?

"MR. HARRISON:—Directly owned by the railway companies, and *the company must be engaged in the business of transporting passengers or property.* In addition, it includes the national railway labor unions as employers" (p. 6). (Emphasis supplied.)

This is from the testimony of Mr. Latimer, Chairman of the Retirement Board, with respect to the Taxing bill, 6448:

"MR. TREADWAY:—Are not a good many bus lines controlled or owned by the railroads?

"MR. LATIMER:—Yes; they are.

"MR. TREADWAY:—Would you make them come under the general provisions of this bill?

"MR. LATIMER:—Not if they are not performing service in the transportation of passengers and property of the railroads. They must be an integral part of railroad operation" (p. 39).

And this is important from Mr. Hay, counsel for the labor interests, in testifying before the Senate Committee on S. 2395:

"SENATOR BARKLEY:—As a matter of fact, this act will only apply to those included in its terms, and they are limited by definition?

"MR. HAY:—Yes.

"SENATOR BARKLEY:—I do not really see the necessity for any amendment.

"MR. HAY:—Frankly, I had some question as to the necessity of it, but since there was a question raised by gentlemen whom we look upon as having sound judgment, I did not want any question to remain——

"SENATOR BARKLEY:—Is there any real need for the language in lines 15 and 16 'as the word "employer" is hereinbefore defined'?

"MR. HAY:—Yes. That phrase, 'as the word "employer" is hereinbefore defined', runs all through this bill. You will find it in section 1 (a).

"SENATOR BARKLEY:—Yes; but the definition of 'employer' is given, and wherever the word 'employer' appears in the bill it would relate back to the definition. I am wondering whether it is necessary to say there 'as the word "employer" is hereinbefore defined.' By defining it you make it apply wherever the use of it appears in the bill.

"MR. HAY:—Senator, in a few places in the bill the word 'employer' by express language is given a broader meaning than the definition in section 1 (a). In order to be certain that it is limited to the employers that we are really covering by the bill, the limitation is written in". (p. 35).*

* Instances are found in Sec. 1 (f) and Sec. 2 (a) of the Act. And this same restrictive language is found in Sec. 1 (a) (b), and similar restrictive language appears in Sec. 6 (a).

The Railroad Retirement Board has sought to belittle the testimony here quoted with respect to the Railway Labor Act, Retirement Act and Taxing Act, asserting that the statements of the sponsoring witnesses are (1) "equivocal", and (2) "that they represent no more than the hypothetical opinions of committee witnesses, derived by inference from testimony susceptible of conflicting inferences" (R. 40). That, of course, is plainly untrue. This phase of the case was brought forcibly to the attention of the lower Appellate Courts, both in brief and on argument. But in No. 103 that court gave it insufficient attention and said, "Individual opinion of witnesses at a hearing is of doubtful value in the interpretation of an act," (No. 103, R. 86) and for that statement relied upon *McCaughn* v. *Hershey Chocolate Co.* 283 U. S. 488, 493-4. But that case is as far distant from the situation here presented as the statement of the court is incorrect when applied to this case. The sentence relied on there is this: "Nor do we think of significance the fact relied upon here and by the court below that statements inconsistent with the conclusion which we reach were made to committees of Congress or in discussions on the floor of the Senate by senators who were not in charge of the bill. * * * " What we have here are direct statements from witnesses in charge of the bills before the committees. And in such instances it has strikingly been brought to the attention of those who practice before this Court how often this Court and the lower federal courts, particularly in recent cases, have resorted to those hearings for the purpose of assistance in gathering the meaning and intent of statutes. Some examples are these: *Interstate Commerce Commission* v. *Parker*, U. S. (June 18, 1945); *Southern Pacific Co.* v. *Arizona*, U. S. (June 18, 1945); *Elgin, Joliet and Eastern Ry. Co.* v. *G. W. Burley*, U. S. (June 11, 1945); *The Western Union Telegraph Co.* v. *Lenroot*, U. S. (Jan. 8, 1945); *Korematsu* v. *United States*, U. S.

(Dec. 18, 1944); *Exparte Mitsuye Endo*, U. S. (Dec. 18, 1944); *Claridge Apartments Co.* v. *Commissioner of Internal Revenue*, U. S. (Dec. 4, 1944); *McDonald* v. *Commissioner of Internal Revenue*, U. S. (Nov. 20, 1944); *Carolene Products Co.* v. *United States*, U. S. (Nov. 6, 1944); *Federal Security Adm'r* v. *Quaker Oats Co.*, 318 U. S. 218; *United States of America* v. *Bethlehem Steel Corporation*, 315 U. S. 289, 304; *United States* v. *Madigan*, 300 U. S. 500, 505; *United States* v. *Missouri Pacific Railroad Co.*, 278 U. S. 269, 279; *Holy Trinity Church* v. *United States*, 143 U. S. 457, 464; *Petition of Bone*, 19 F. Supp. 219, 222; *Securities & Exchange Commission* v. *Robert Collier & Co.*, 76 F. (2d) 939, 940; *Smith* v. *Gilliam*, 282 Fed. 628, 636; *Coke* v. *Illinois Central Railroad Co.*, 255 Fed. 190, 194. And see *Tap Line Cases*, 234 U. S. 1, 27.

From a review of the foregoing testimony it is submitted that these conclusions result:

1. The parties intended to be covered by the Unemployment Act are the same as those covered by the Retirement Act.

2. The history of the Retirement Act includes that of the Railway Labor Act. That Act was intended to cover only those parties performing part of what is well known as railroad transportation itself. As was said by Mr. Eastman, it was not intended to go beyond carriers and their subsidiaries engaged in that transportation. One of the reasons for this was because of the possible conflict with other industries which were covered by the National Industrial Recovery Codes. And Duquesne during the life of the National Industrial Recovery Act was under such a code (R. 185).

3. As to the Retirement Act itself, and bearing in mind that its terms are the embodiment of an agreement

between management and labor, the coverage was intended to include only the following:

(1) Carriers subject to Part I of the Interstate Commerce Act and their employes.

(2) Associations, bureaus and agencies controlled and maintained wholly or principally by two or more employers and which perform services in connection with or incidental to railroad transportation, such as consolidated ticket offices and demurrage bureaus whose employes are admittedly in railroad service.

(3) Companies directly or indirectly owned or controlled by one or more such carriers and engaged in "service that is a part of railway transportation" (Harrison, *supra*, p. 35); "operated by the railroad as a part of its transportation," or "in other words part of the railroad plant" (Harrison, *supra*, p. 38).

(4) Those labor organizations directly subject to the Railway Labor Act.*

V. The Retirement And Unemployment Insurance Acts Relate To The Railroad Industry And It Was Never Intended That Their Coverage Should Extend To The Warehouse Industry.

This phase of the case is best brought out in the hearings before the Senate and House Committees on the bills which became the Unemployment Insurance Act:

> "To state the purpose of the bill in a sentence, it is this: It is to do for the railroad industry with respect to unemployment compensation what the Railroad Retirement Act does for that industry with respect to old-age benefits; that is to say, to set up a separate system applicable only to the railroad industry.

* "SENATOR SMITH:—You just include those members of these different organizations who are directly connected with the railroads?

"MR. HARRISON:—With the railroad industry." (Senate hearings on S. 2395, p. 19. (Retirement Act).)

"THE CHAIRMAN:—That is, you want to take it out of the general law?

"MR. HAY:—We want to lift it out of the general social security system and apply this system to the railroad industry alone."

(Hay, Senate Hearings, S. 3772, June 3, 1938, p. 25.)

"Our association has had two principal objectives in this matter. We want a plan of unemployment insurance that any railroad worker can understand. We want a plan of unemployment insurance that is practical for railroad workers, that fits their needs and the conditions of their employment. I have already said that the passage of this bill will mean a landmark in the history of social-security legislation in the United States, because we know that all our members will clearly understand their rights under it. I want now to emphasize our second purpose."

(Cashen, House Hearings, H. R. 10127, May 26, 1938, p. 23.)

And it is emphasized by Mr. Reed, Member, Railroad Retirement Board, in his dissenting opinion, from which we quote the following:

"The lines of demarcation as to industry and its extent in this country have been closely defined. In these later times this has been because of the labor situation. For instance, there is a steel industry and a copper industry, and like industries in other metals, such as lead and zinc. Each is separate nd distinct. Also there is a clothing industry. And separate and apart from that, there is a cleaning industry. While there are many workers engaged in the cleaning industry who perform work on clothing, yet no one would contend that the cleaning industry

is the clothing industry or a part of it. Similarly, there is a fishing industry and a canning industry. And yet no one would contend that the canning of salmon is a part of the fishing industry. Further, there is a railroad industry for those employed in the railroad transportation. And there is a warehouse industry for the commercial storage and handling of goods.* Further, there is a shipping industry for transportation by water, and yet no one would assert that the shipbuilding industry is a part of that shipping industry.'" (No. 103, R. 53-4.)

This line of cleavage is expressed as follows in the case of *Allen* v. *Ocean S. S. Co. of Savannah, supra*:

"It is quite apparent that the construction appellant contends for will result in cutting across industrial lines and in absorbing into the special railroad insurance system, some part of other industries because those parts happen to be owned by railroads, while that for which appellee contends, will have no such effect. That consideration alone should, we think, give us pause in construing, indeed should prevent our construing the act as appellant does, unless its language does not reasonably admit of any other result." (P. 471.)

VI. The Words "In Connection with" as Used in These Acts Are not Appropriate or Applicable to the Services Performed by Duquesne. This Has Been Ruled by the Retirement Board Itself, and Has Been so Determined by the Courts and the Interstate Commerce Commission in Numerous Cases.

In order to bring Duquesne within the coverage of the Railroad Retirement and Railroad Unemployment In-

* Investigation discloses that the storage and moving of household effects is still another branch.

surance Acts, it must not only be owned by a carrier, as it is, but must also "perform service * * * in connection with the * * * storage * * * of property transported by railroad." As already pointed out, this language, *supra*, page 30, according to the testimony of Commissioner Eastman, was borrowed from the definition of "transportation" as used in the Interstate Commerce Act, viz., "all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported."

In other words, to bring Duquesne within the coverage of the Railroad Retirement and Railroad Unemployment Insurance Acts, it must perform that kind of storage in connection with the transportation of property by railroad, which is defined by the Interstate Commerce Act as forming a part of transporation service. This is in line with Mr. George Harrison's testimony that the Retirement Act applies only to railroad subsidiaries which are "engaged in service that is a part of railroad transportation," or "operated by the railroad as part of its transportation," when read together with the Senate Committee's statement that the Unemployment Insurance Act has the same coverage as the Retirement Act.

The main question in this case is, therefore, whether the storage service performed by Duquesne, irrespective of its ownership, is the kind of storage which amounts to a transportation service. In other words, if Duquesne were not railroad-owned, would its storage service be "in connection with transportation by railroad" in such sense as to amount to railroad transportation service?

The Record (R. 178-9) shows that there is another warehouse company at Pittsburgh, also located on the line of the Pennsylvania, and which has a private siding from the Railroad to its warehouse. Sugar is received and handled by that warehouse company from a large eastern refiner in precisely the same manner as sugar is

received and handled from another refiner by Duquesne at East Liberty. It arrives in car lots. After delivery by the railroad on siding, it is unloaded by that warehouse company, handled by the warehouse company, and subsequently distributed by it under direction of the owner. The services performed by it are precisely those performed by Duquesne. It has never been asserted that the services of that warehouse company are services "in connection with transportation by railroad" in the sense of transportation services.

There is an obvious common-sense distinction between general commercial storage or warehousing, even though the articles may have received a prior movement by rail or are intended to receive a subsequent movement by rail, and railroad storage proper in the sense of storage of property received by a carrier and awaiting transportation by the carrier, or awaiting delivery by the carrier following transportation. Clearly it is along the line of this common-sense distinction that the boundary was intended to run between warehousing covered by the Railroad Retirement and Unemployment Insurance Acts and warehousing not so covered. This was at one time emphasized and insisted upon by the Railroad Retirement Board itself.

Under the Retirement Act, Section 10 (b) 4, and the Unemployment Act, Section 10 (c), the Board is required to make an annual report to the President of the United States for submission to Congress. As so required it made such a report for the fiscal year ending June 30, 1938, covering both Acts. It is obviously of the highest importance that in that report, in speaking of the precise question of coverage here in issue, the Board said:

> "Storage of property received for a carrier and awaiting transportation by the carrier, or awaiting delivery by the carrier following transportation, is an employer service, *but performance of the usual commercial storage and warehousing business is not.*" (P. 142.) (Emphasis supplied.)

This is in accord with Mr. George M. Harrison's testimony, quoted above, p. 38, in which he identified the warehousing covered by the Acts as that which was in effect "part of the railroad plant." The Retirement Board repeated this correct and obvious construction of the coverage provisions of the Acts in a circular dated October 7, 1938, and given widespread distribution under the heading, MEMORANDUM No. U.-I.—S. 1—COVERAGE OF "EMPLOYERS", "EMPLOYES' REPRESENTATIVES", AND "EMPLOYES" UNDER THE RAILROAD RETIREMENT ACT OF 1937 AND RELATION TO COVERAGE UNDER THE RAILROAD UNEMPLOYMENT INSURANCE ACT.

The distinction between general warehousing or commercial storage on the one hand and railroad storage, or that part of storage or warehousing which is incidental to railroad transportation and is part of the transportation service on the other hand, is an obvious and well-understood distinction. It is not the obligation of a common carrier by rail to furnish general commercial storage; it is the obligation of such a carrier to supply that kind and amount of storage which, as a practical matter, is a necessary preliminary to, or consequence of, transportation. Clearly it is only storage of the latter limited kind which is defined as a transportation service in the Interstate Commerce Act; and precisely the same language is borrowed for the coverage provision of the Railroad Retirement and Railroad Unemployment Insurance Acts.

The kind of storage or warehousing which is a transportation service is the storage which arises in the course of railroad transportation, as, for instance, where goods are received by the carrier for forwarding but withheld pending receipt of shipping instructions—*Atlantic Coast Line R. R. Co.* v. *Basnight*, 111 N. C. 592. Also, where goods have reached destination but delivery is not taken within the time prescribed by the tariffs—*Cleveland, C., C. & St. L. Ry. Co.* v. *Dettlebach*, 239 U. S. 588; *Southern Railway Co.* v. *Prescott*, 240 U. S. 632. But it is not part

of the duty of the carrier to furnish commercial storage for the care of goods after the transportation has ended; and such service is not part of railroad transportation. *Turner, Dennis & Lowry Lbr. Co.* v. *C. M. & St. P. Ry. Co.*, 271 U. S. 259, 262. The following is in point from *Guaranty Claim of Central Elevator & Warehouse Co.*, 72 I. C. C. 169, 176:

> "Storage of property transported is a transportation service only to the extent that storage is necessarily incidental to transporting such property, and the term has been used in section 1 in that limited sense. As was said by the court in *State* v. *Southern Pacific Company, supra:**
>
> 'We think that the storage of goods by a railroad in its warehouses, as a matter incidental to its business as such, contemplates and looks to a rotation of storage as immediate and prompt as the railroad corporation can make it. * * * To be incidental business, the storage must be preliminary either to immediate transportation or immediate removal'."

In its determinations in the instant cases, the Retirement Board has sought to extend its jurisdiction over ordinary commercial warehousing by reliance on the words "in connection with" as used in the coverage provisions of the Railroad Retirement and Railroad Unemployment Insurance Acts. By reliance upon these words, it has sought to bring within the coverage of the Acts not merely the strictly railroad storage which is part of the transportation service, but general commercial storage of articles which have had some prior movement or are intended to have some subsequent movement by rail. The Board's thought is apparently that if an article has received, or is intended for, rail movement, then its storage is "in connection with" transportation by railroad.

* 52 La. Ann. 1822, 28 Sou. 372.

This ignores the use of the words "in connection with" in Section 1 (3) (a) of the Interstate Commerce Act. There, the storage referred to is undeniably limited to storage which is an actual part of the transportation, and yet it is described by use of the words "in connection with." These words have come to be so familiarly employed in many provisions of statutes dealing with transportation as to have acquired a clear and definite significance in transportation law. The Retirement Board has gone astray through lack of familiarity with this use of the words.

It has long been customary in transportation statutes to use the words "in connection with" as relating to some act or thing done to property in the course of, or during the progress of, or as a part of, the actual transportation. Thus, Section 15 (13) of the Interstate Commerce Act provides that, if the owner of property transported "directly or indirectly renders any service connected with such transportation," the charge and allowance therefor shall be published in filed tariffs and shall be no more than is just and reasonable. Clearly this relates to a service rendered during the course of, or as a part of, the actual transportation, and not to something done to the property before or after the transportation. Similarly, Section 1 (5) provides that charges for "any service rendered or to be rendered in the transportation of property, or in connection therewith, shall be just and reasonable." Here again the reference is obviously to a service rendered as part of the transportation. We have already seen above that in Section 1 (3) (a) the words "all services in connection with the receipt, delivery, elevation, etc., of property transported," which are defined as constituting transportation, are meant only to refer to such services when rendered in the course of, or as a part of, the actual transportation.

Accordingly it has come to be well recognized by the courts that the words "in connection with" or "connected

with" when used in relation to transportation, refer to acts or things which are a part of the transportation. Thus in construing that part of Section 15 (13) of the Commerce Act, which deals with allowances to the owner of property "who renders any service connected with such transportation" the words "connected with such transportation" were explained in *New York Central & Hudson River Railroad v. General Electric Co.*, 146 N. Y. Supp. 322 (1914), as follows:

> "* * * I understand that the defendant urges that the wording of Section 15, 'if the owner of property transported under this act directly or indirectly renders any service connected with such transportation or furnishes any instrumentality used therein,' etc., includes this service in question; that the service from which the owner may receive compensation from the carrier under this provision need not be a part of the transportation itself, but only connected with it. I conclude, however, that *the expression 'connected with' is a synonym of 'a part of it'; it does not mean something, in addition to transportation, that touches, or is attached to, transportation.* A common carrier of property cannot include in its charge for transportation an item which is not a part of transportation, and it was not intended by said provision to require the carrier to pay for a service which it was not bound as a carrier of property to render and for which it could not charge. * * *" P. 327. (Emphasis supplied.)

That case was affirmed by the Court of Appeals in 219 N. Y. 227, where reference is made in its opinion to the "careful opinion" of the trial court (p. 234). Certiorari was denied by this Court, 243 U. S. 636. And the de-

cision in the Court of Appeals was relied upon by the Interstate Commerce Commission in reaching a like conclusion in *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11, 23. See also *Pennsylvania R. Co.* v. *M. McGirr's Sons Co.*, 287 F. 334 (1922), a Second Circuit case, certiorari denied, 262 U. S. 743; *American Sugar Refining Co.* v. *D. L. & W. R. Co.*, 200 Fed. 652, reversed in 207 Fed. 733 on other grounds, but quoted from with approval in the *McGirr* case, *supra*; *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 444; *United States* v. *Baltimore & Ohio R. R. Co.*, 231 U. S. 274; *Uniform System of Accounts*, 171 I. C. C. 557; petition to enjoin enforcement of Commission's order dismissed, *Norfolk & Western Railway Co.* v. *United States*, 52 F. (2d) 967, affirmed 287 U. S. 134; *Pennsylvania Railroad Co.* v. *Knight*, 192 U. S. 21.

The Retirement Board in the instant cases departs completely from this uniform and established course of construction. In support of its position it cites five cases, of which the *Danciger* case, 248 U. S. 319, is typical. That case, like the others, has been misunderstood by the Board. There, the act held to be "in connection with" transportation occurred while the property was actually in the possession of the carrier and before the transportation had ended. It is, therefore, no authority for the Board's contention that something which precedes the commencement or follows the termination of the transportation may be "connected" therewith. The case involved violation of the United States Criminal Code with respect to the transportation of liquor from a point without to a point within a dry state. The collection of the purchase price before delivery of the property by the carrier and while the property was in the carrier's possession was held to be "in connection with" the transportation of the same. On this point the court said:

"To be within the statute it is essential that the act of collecting the purchase price be done 'in connection with the transportation of' the liquor. The statute does not say 'in the transportation,' but 'in connection with' it. Transportation, as this court often has said, is not completed until the shipment arrives at the point of destination and is there delivered. *Rhodes* v. *Iowa*, 170 U. S. 412, 415, 420; *Vance* v. *Vandercook Co.*, 170 U. S. 438, 451; *Louisville & Nashville R. R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70, 82; *Kirmeyer* v. *Kansas*, 236 U. S. 568, 572; *Rosenberger* v. *Pacific Express Co.*, 241 U. S. 48, 50. What Cooley did, while not part of the transporation, was closely connected with it. He was at the point of destination and held the bill of lading, which carried with it control over the delivery. Conforming to his principal's instructions he required that the purchase price be paid before the bill of lading was passed to the vendee. The money was paid under that requirement and he then turned over the bill of lading. A delivery of the shipment followed and that completed the transportation. Had the carrier done what he did all would agree that the requisite connection was present. As the true test of its presence is the relation of the collection, rather than the collector, to the transportation, it would seem to be equally present here." (pp. 327-8)*.

Clearly neither this language nor the facts of the case support the Board's contention that storage which takes place after the termination or before the commencement of transportation is "in connection" therewith.

* The better reasoning in the Florida case referred to in the Board opinion (R. 32) appears in the dissenting opinion. And that was not a transportation case.

VII. On the Undisputed Facts of the Instant Cases the Services Performed by Duquesne are Subsequent to the Termination or Prior to the Commencement of the Railroad Transportation, and Are Therefore Not "in Connection with" the Transportation in Such Sense as to Fall Within the Coverage of the Railroad Retirement and Railroad Unemployment Insurance Acts.

The undisputed facts in the instant cases indicate a course of business on the part of Duquesne which is clearly ordinary commercial storage, because the storage is performed before the commencement or after the termination of railroad transportation. This is clearly the case in connection with a number of features of the storage service rendered by Duquesne which have not been properly understood by the Retirement Board and have, therefore, been improperly treated as indicating that the storage was part of the transportation. These may be considered under four headings: (*a*) delivery on private siding; (*b*) Duquesne as consignee; (*c*) loading and unloading of cars; (*d*) storage in transit.

(*a*) Delivery on Private Siding—Each of the two Duquesne warehouses has a siding of its own where carlot deliveries are made. Railroad transportation is then and there ended (R. 22, 134). In the case of less than carlot freight, delivery is made to Duquesne by Pennsylvania's agency *as in the case of any other consignee*. On outbound shipments the reverse is the case. That delivery on such a siding is the complete end of railroad transportation has long been settled law.

> "In the instant case, when the carrier placed the car containing the pulp on the siding designated in the bill of lading, it had reached its destination and the transit was at an end. The Eddy, 72 U. S. (5 Wall.) 481, 495, 18 L. Ed. 486; Convers *v.* Ennis, 6 Fed. Cas. 377, No. 3149; *In re* M. Burke & Co.

(D. C. W. D. Pa.), 140 Fed. 971, 15 Am. Bankr. Rep. 495; *In re* W. A. Paterson Co. (C. C. A. 8), 186 Fed. 629, 108 C. C. A. 493, 25 Am. Bankr. Rep. 855, 34 L. R. A. (N. S.) 31; Shepard & Morse Lumber Co. *v.* Burroughs, 62 N. J. Law 469, 41 Atl. 695; 2 Kent. Comm. pp. 706, 707; Johnson *v.* Eveleth, *supra*; Benj. on Sales (5th Ed.) pp. 906, 907; Scott *v.* Pettit, 3 B. & P. 469; Ellis *v.* Hunt, 3 T. R. (D. & E.) 464; Kendal *v.* Marshall Stevens & Co. (C. A.) 11 Q. B. D. L. R. (1882-83) 356; Sawyer *v.* Joslin, 20 Vt. 172, 49 Am. Dec. 768."

In Re Arctic Stores, 258 Fed. 688, 691.

"* * * It has been held that a railroad corporation is required to deliver cars upon such a siding provided it is within its switching area or its terminal limits, and that transportation ends when cars are placed upon the siding. New York, New Haven & Hartford Railroad *v.* Porter, 220 Mass. 547, 108 N. E. 499; Batchelder & Snyder Co. *v.* Union Freight Railroad, 259 Mass. 368, 156 N. E. 698, 54 A. L. R. 616; Los Angeles Switching Case (Interstate Commerce Comm. *v.* Atchison, T. & S. F. R. Co.), 234 U. S. 294, 34 S. Ct. 814, 58 L. Ed. 1319; United States *v.* American Sheet & Tin Plate Co., 301 U. S. 402, 57 S. Ct. 804, 81 L. Ed. 1186; Banner Grain Co. *v.* Great Northern Railway, 119 Minn. 68, 137 N. W. 161; 41 L. R. A., N. S., 678; New York Central & Hudson River Railroad *v.* General Electric Co., 219 N. Y. 227, 114 N. E. 115, 1 A. L. R. 1417; Lee *v.* Erie Railroad, 173 App. Div. 75, 158 N. Y. S. 730."

Rice & Lockwood Lumber Co. v. Boston & M. R. R., 398 Mass. 101.

(*b*) Duquesne as Consignee.—The shipments which come in via rail to Duquesne are consigned to the owners, care of Duquesne. Under that form of consignment,

delivery to Duquesne is delivery by Pennsylvania to the consignee, and railroad transportation is at that point completed.

> "Where goods are shipped to a consignee in the care of another person, that person has the right to receive the goods and he becomes the proper person to whom the carrier may make delivery. City National Bank *v.* El Paso & Northeastern Railway, 262 U. S. 695, 43 S. Ct. 640, 67 L. Ed. 1184; Commonwealth *v.* People's Express Co., 201 Mass. 564, 572, 88 N. E. 420, 131 Am. St. Rep. 416."
>
> *Philadelphia Tapestry Mills* v. *New England S. S. Co.*, 251 Mass. 270.

See also Federal Bills of Lading Act, Sec. 42, definition of "consignee".

(c) Loading and Unloading of Cars—The Retirement Board asserts that the loading and unloading of cars by Duquesne is "in connection with railroad transportation", and that these services are "important elements of railroad transportation" (R. 27, 30). This is but another instance of the gross fallacy on which the whole case of the Board rests. The unloading and loading is done by Duquesne for its customers. The Board specifically so finds (Findings 5 and 6, R. 21-3). These services are before railroad transportation has begun or after it has ended. The facts so say (R. 134). The tariff of the railroad company forbids its performing the services (R. 135). Under such circumstances loading and unloading is not and cannot be a part of railroad transportation.

> "Transportation includes delivery. Under the plaintiff's published tariffs it does not include the work of loading and unloading. Official Classification, 38, Interstate Commerce Commission. * * *"
>
> *New York Central & H. R. R. Co.* v. *General Electric Co.*, 219 N. Y., 227, 234.

See also *Louisville Cement Co.* v. *United States*, 19 F. Supp. 910, 916, and *Pennsylvania Railroad Company* v. *Kittanning Iron & Steel Manufacturing Company*, 253 U. S. 319, 323.

(*d*) STORAGE IN TRANSIT—This term is a misnomer. It is in fact storage *out of transit*. It means that when carload freight of named commodities is shipped into designated points over a named railroad, and then taken out of railroad transportation for storage purposes and subsequently reshipped over the line of the same railroad, that freight in carload lots is entitled to the through rate to ultimate destination instead of the combination of locals into and out of the transit point. It has no application whatever to the warehouse. It does not affect its charges. It affects the railroad charges only—*Central R. R. Co. of N. J.* v. *United States*, 257 U. S. 247. Railroad transportation has ended when the property is delivered to the warehouse.

"The contention that the Santa Fe's canceled tariff was legally part of a through rate is also unsound. The argument rests upon a fiction—the fiction of a through rate with transit privilege. As applied here, the fiction is inconsistent with every fact of legal significance. When grain is shipped from a country point to a primary market, its ultimate disposition is rarely known. Who the owner of the grain will be when it reaches the primary market is uncertain. It may be sold en route before arrival there. While stored there, it may be resold several times. Some of it may be consumed in local flour mills. Most of that stored in local elevators will probably be shipped out. But until the grain is shipped out it will not be known to what place, or even in what direction, or by what railroad, it will be carried. Southern Kansas Grain Ass'n *v.* Chicago, Rock Island & Pacific Ry. Co., 139 I. C. C. 641, 666.

> The treatment of substantially all grain coming from the country point is this. The bill of lading is for a shipment from the country point to the primary market. There is nothing in any of the papers connected with that transportation to indicate that the grain has a destination beyond the primary market. Upon arrival there, the owner requires delivery to be made at such elevator or other place as he selects. The freight charges are paid: the amount being the full local rate for transportation from the country point to the primary market. The car is then released; and the movement called inbound ends."
>
> *Atchison, T. & S. F. Ry. Co.* v. *United States*, 279 U. S. 768, 777-8.

See also *F. H. Peavey & Co.* v. *Union Pacific R. Co.*, 176 Fed. 409, 419.

The facts show that at East Liberty this transit privilege is not limited to sugar but applies also to canned foodstuffs. And the privilege is not local to Pittsburgh but applies at other points on other products, and is available to any shipper of the named commodities at the named points (R. 136).

The tariff of the railroad company under which the privilege is offered to shippers contains this pertinent provision:

> "While the shipments are stored in transit under these rules their custody and possession as between carrier and the consignee or owner, shall be that of the consignee or owner."

This Court has sustained a holding that such services are not a part of railroad transportation:

> "The Commission found that the in-transit warehousing was not a part of transportation. . . .
>
> . . . . . .
>
> "We accept this conclusion. . . ."
>
> *Baltimore & O. R. Co.* v. *United States*, 305 U. S. 507, 525-6.

VIII. Answers To Certain Specific Points Raised By Retirement Board.

A. WAREHOUSING.—It is claimed by the Retirement Board that its ruling in these cases follows from its decision in the case of the *Baltimore Fidelity Warehouse Company*, R. R. B. Law Bulletin No. 2, p. 532 (R. 26). But in that case it affirmatively appeared that the ~~railroad~~ warehouse company was performing services in connection with the transportation of property by railroad. We have no quarrel with such a decision except to say that it is not in point here. And this is from the Board's own opinion in that case:

> "In addition to storing goods transported by the Railway Company the Warehouse Company acts as freight agent for the Railway Company at three of its stations in Baltimore, the York Street Station, Brown's Wharf and Fidelity Station" (p. 534).

B. HANDLING OF REFUSED AND DAMAGED FREIGHT.—The facts are these:

> "* * * The warehouse company also at the warehouse receives from the railroad company freight which has been damaged and refused. At that time the warehouse company takes entire possession of the freight, reconditions it, and sells it at private sale. In case the freight proves to be worthless, the warehouse company disposes of it. For these services the warehouse company charges the railroad company 10% of the gross proceeds of sale, with deductions for any necessary expenses in reconditioning and handling, and remits the balance to the railroad company. *This is after the freight has finished its transportation and is turned over to the warehouse company for disposal by the railroad company in a separate and independent transaction*" (R. 137). (Italics supplied.)

In the handling of this freight Duquesne has never delivered any of it to the consignee or owner; nor has

Duquesne under any direction of Pennsylvania ever disposed of any of such freight which has become so worthless as to be unsalable (R. 178). And since the record concedes that the services in question are performed after railroad transportation has ceased, it does not appear how they could be "in connection with" it.

C. THE FACT THAT THE PRINCIPAL OFFICERS OF DUQUESNE ARE ALSO CORPORATE OFFICERS OF THE PENNSYLVANIA DOES NOT MAKE DUQUESNE EITHER AN AGENT OF PENNSYLVANIA OR ONE OF THE DEPARTMENTS OF THAT RAILROAD COMPANY. The statute itself recognizes the existence of the affiliate. The test is the nature of the services which Duquesne performs. The Retirement Board so admits (R. 31). Nor is there anything in this record to show dominance by Pennsylvania of policy or operation by Duquesne. As to that the District Court in No. 95 said:

> "* * * Duquesne has always conducted itself as a separate distinct corporate entity. Duquesne's employees perform services solely for Duquesne and there is no interweaving of the services of the employees of Duquesne and those of Pennsylvania; they are on entirely different payrolls. Duquesne's employees are and have been recognized solely as employees of a warehouse and hence have never been granted the privileges that Pennsylvania's employees may have had. Duquesne was recognized as a member of the Warehouse Industry under the N. R. A. Code. Duquesne was recognized and paid accordingly, as a member of the General Social Security Plan and not as a member of the Special Railroad Security System * * *" (pp. 91-2).

This phase of the case is so well expressed by the Interstate Commerce Commission in *Portland Traction Company*, 237 I. C. C. 647, 650, that we venture to present to the Court that language:

"The Board and the employees urge that the Traction Company is a part of the Electric Company and point out the ownership of the former by the latter, the fact that the two companies have the same officials, the joint use of the tracks and shop facilities, and other matters already herein discussed. None of those, however, are convincing that the Traction Company performs any transportation services more than those ordinarily performed by a street, suburban, or interurban railway. The ownership of a street suburban or interurban railway by a commercial railroad or the use of some of the latter's tracks and shop facilities by the former does not make it more than a street, suburban, or interurban railway. Where there are two separate operating entities, as are here involved, their operations must be considered separately and their status determined by the transportation service performed by each. The evidence shows that the Traction Company is not, and since August 29, 1935, has not been, more than a street, interurban, or suburban electric railway within the meaning of the exemption provisions here considered, and that it is not a part of the general steam-railroad system of transportation."

CONCLUSION.

Duquesne submits that from the foregoing argument it has been shown that:

1. Since the facts are not in dispute, the question before the Court is one of law, and the Court is at liberty to reach its own determination.

2. The two warehouses operated by Duquesne are not facilities of the Pennsylvania, nor are the services which have been and are being performed by Duquesne in connection with the transportation of property by railroad

or the receipt, delivery, transfer in transit, storage, or handling of property transported by railroad, as required by the statute.

3. The findings of the Retirement Board that the facilities operated by Duquesne and the services performed by it are in connection with the transportation of property by railroad, or the receipt, delivery, transfer in transit, storage, or handling of property transported by railroad are totally unsupported by any evidence and are entirely arbitrary and capricious.

4. The findings and opinion of the Retirement Board and the opinion of the Court of Appeals for the District of Columbia are grounded on a misapprehension of law, and are contrary to the correct interpretation and application of the statutes involved.

5. The determination of the questions at issue by the United States District Court for the Southern District of New York and the Circuit Court of Appeals for the Second Circuit was correct, and the judgment of the latter court should be affirmed.

6. The judgment of the United States Court of Appeals for the District of Columbia should be reversed, and that of the District Court of the United States for the District of Columbia should be affirmed.

Respectfully submitted,

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OCTOBER 15, 1945.

APPENDIX.

Italicized findings of fact of the Railroad Retirement Board excepted to by Duquesne as not supported by any evidence, contrary to the evidence in the record, or immaterial on any proper construction of the statutes.

1. Duquesne was incorporated on August 1, 1906, under the laws of the State of Pennsylvania. Since Duquesne's incorporation, it has been directly and completely owned *and controlled,* through stock ownership, by the Pennsylvania Railroad Company, herein called Pennsylvania, a carrier by railroad subject to Part I of the Interstate Commerce Act (R. 20).

3. *Duquesne's operations are now and have been at least since August 28, 1935, intimately and integrally related to Pennsylvania's railroad transportation.* Duquesne has been primarily, principally and predominantly engaged in the storage, loading and unloading, and other handling of goods transported over the lines of Pennsylvania, *being in substance an agency of Pennsylvania for such purposes* (R. 21).

4. *The two warehouses operated by Duquesne—one in Pittsburgh proper and the other at East Liberty in Pittsburgh—have been valuable links in the chain of Pennsylvania's railroad transportation.* They are owned by Pennsylvania and are operated by Duquesne under lease from Pennsylvania. A portion of the ground floor of each warehouse is retained by Pennsylvania and used and officially designated by it as its "freight agency." Duquesne's warehouses, as well as Pennsylvania's "freight agencies," are served by Pennsylvania's railroad tracks and are equipped with platforms or sidings and other facilities for the receipt, delivery, and other handling of inbound and outbound freight (R.21).

8. *Duquesne's position as an agency of Pennsylvania, available to provide such facilities and services as the latter requires, appears further from Duquesne's handling, reconditioning, and selling for Pennsylvania, over freight, damaged, refused freight, and damaged unclaimed freight under a contract originally entered into between the two companies on February 1, 1922, and superseded by a contract dated January 2, 1941.* Pennsylvania transports to Pittsburgh any freight it desires to be disposed of by Duquesne and Duquesne removes such freight to its warehouse after the payment to Pennsylvania of all freight and other charges that may have accrued thereon. Out of the gross proceeds realized by it from each sale, Duquesne deducts a commission of 10 per cent and any amounts paid by it for reconditioning, drayage, freight, and other charges, and turns the balance over to Pennsylvania. In the event that the gross proceeds of the sale of freight do not equal the expenses incurred by Duquesne, plus the 10 per cent commission, Duquesne is credited with the difference. When any freight is returned by Duquesne to Pennsylvania upon the latter's order, Duquesne is reimbursed only for the actual expenses incurred by it plus storage charges. Under the original contract, if any lot of freight became so worthless as to be unsalable, Duquesne was required to dispose of it as directed by Pennsylvania. Under the new contract, Duquesne is given authority to dispose of such goods as it sees fit. The original contract also provided that if the owner of any unclaimed freight is ascertained prior to the sale of such freight, Duquesne was to deliver such freight, upon instructions from Pennsylvania, to the owner, and was to receive from the owner such charges as Duquesne has paid to Pennsylvania. The new contract provides that under such circumstances Duquesne shall, upon Pennsylvania's request, return such freight to Pennsylvania upon the payment of all charges thereon which Duquesne shall have paid to Pennsylvania (R. 23-4).

9. Duquesne's revenues for the years 1936 through 1938 *show the substantial extent to which it has been engaged in functions and activities connected with Pennsylvania's railroad transportation:*

	Storage and handling of freight under storage-in-transit privileges	Storage and handling of other freight (including freight coming in or going out, or both, over Pennsylvania's rails)	Sale of damaged merchandise	Subleasing of space to manufacturing concerns
1936	$ 59,570.40	$ 63,011.60	$ 8,599.00	$32,732.00
1937	30,239.93	91,545.99	11,409.00	24,967.00
1938	29,836.01	73,702.99	8,881.86	16,035.17
	$119,646.34	$228,260.58	$28,889.86	$73,734.17

(R. 24)

13. *Duquesne's operations are, and have been at least since August 28, 1935, directly related, functionally and economically, to the performance of the transportation obligations which Pennsylvania has undertaken as a common carrier by railroad, and to the receipt, delivery, transfer in transit, storage, and handling of property transported by Pennsylvania by railroad* (R. 25).

14. *Duquesne is, and has been at least since August 28, 1935, engaged in the non-casual operation of equipment and facilities and the performance of non-casual service in connection with Pennsylvania's transportation of property by railroad, other than trucking service, and the receipt, delivery, transfer in transit, storage and handling of property transported by Pennsylvania by railroad* (R. 25).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 95.

RAILROAD RETIREMENT BOARD, BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYES, AND GEORGE M. HARRISON,

Petitioners,

v.

DUQUESNE WAREHOUSE COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 103.

DUQUESNE WAREHOUSE COMPANY,

Petitioner,

v.

RAILROAD RETIREMENT BOARD AND BROTHERHOOD OF RAILWAY CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

ANSWERING BRIEF FOR DUQUESNE WAREHOUSE COMPANY, RESPONDENT IN NO. 95, AND PETITIONER IN NO. 103.

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ARGUMENT.

I. The Contention of the Retirement Board and the Brotherhood That the Services Covered In the "Employer" Definition of the Retirement and Unemployment Acts Have Greater Breadth Than Those Covered In the Definition of "Transportation" In the Interstate Commerce Act, and That, Therefore, the Statutory Terms Involved In the Instant Cases Be Not Given the Same Construction As In the Commerce Act, Is Erroneous.

(1) It is not our contention that the Retirement and Unemployment Acts cover no types of service that are not regulated by the Interstate Commerce Act. Maintenance and track work are cases in point. But clearly such work is "in connection with" transportation, having to do with the very facilities through which the rail movement is conducted. In the instant cases the services which are in issue are of the type enumerated in the Commerce Act. They can only be brought under the Retirement and Unemployment Acts through words imported into those acts from the Railway Labor Act, in which they were inserted from the Commerce Act by an Interstate Commerce Commissioner.

And it is essential to notice that those words in the Refirement and Unemployment Acts, such as receipt, delivery, storage and handling, are qualified by the words "transported by railroad," being the same as the word "transported" in the Commerce Act where the additional words "by railroad" were unnecessary. Our position on this, which is that such services must be in connection with the property while in the course of railroad transportation, is covered more fully in our main brief (pp. 45-53). This limited scope is reinforced by this testimony from the same Mr. Harrison before the Senate Committee on S. 2395 (Retirement Bill 75th Congress, 1st Session, May 21, 1937:

"Senator Davis:—What trucking service do you except?

"MR. HARRISON:—Well, you see the railroads recently have inaugurated store-door pick-up and delivery merchandise service, for merchandise freight. And that store-door pick-up and delivery service for merchandise freight is at the present time quite generally handled under contract by an outside trucking company.

"SENATOR SMITH:—And not by the regular employees of the railroad?

"MR. HARRISON:—No. So therefore it only excludes a company that might be engaged in the transportation of property for the railroad, if that company is engaged in the business of trucking the freight; that means motor trucks.

"SENATOR MINTON:—Does it take in a company like the Greyhound Co.?

"MR. HARRISON:—No; that comes under title II of the Interstate Commerce Act.

"THE CHAIRMAN:—But it says [reading]:

'(*a*) The term "employer" means any express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act, and any company which may be directly or indirectly owned or controlled thereby or under common control therewith.'

"MR. HARRISON:—Yes. But that is qualified later on, Senator.

"THE CHAIRMAN:—I see; I was wondering if there was a qualification. I did not see any in that paragraph.

"SENATOR MINTON:—It says 'trucking service.'

"MR. HARRISON:—Well, this is the statement [reading]:

'(*a*) The term "employer" means any express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act, and any company which may be directly or indirectly owned or controlled thereby or under common control therewith, and which operates any equipment or facilities or performs any service (other than trucking service)——'

"And then here is the qualification [reading]:

> "in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad'." (pp. 11-12).

And when the same witness spoke of "elevator companies that handle the storage of grain" (R. B. Brief 33), he could only have had in mind the express requirement with respect to through export freight, at that time contained in the Commerce Act (Sec. 25 (4)), that "In all such cases it shall be the duty of the carrier by railroad to deliver such shipment to the vessel as a part of its undertaking as a common carrier." This has since been repealed (54 Stat. at p. 949).

Further discussion of this phase of the case, we suggest, is unnecessary because we think this Court has already determined that these words "transported by railroad" apply only when the property is in the course of railroad transportation. The case before the Court was *Cleveland, C. C. & St. L. Ry. Co.* v. *Dettlebach*, 239 U. S. 588. There the question presented was with respect to limitation of liability as to value contained in the covering bill of lading after the shipment had reached destination and the responsibility of the carrier had descended to that of warehouseman. This Court held that under the terms of the Commerce Act such storage while the goods were in possession of the carrier was part of the railroad transportation. It said this:

> "And this is quite in line with the letter and policy of the Commerce Act, and especially of the amendment of June 29, 1906, known as the Hepburn Act (34 Stat. 584, c. 3591), which enlarged the definition of the term 'transportation,' (this, under the original act, included merely 'all instruments of shipment or carriage') so as to include 'cars and other vehicles and all instrumentalities and facilities of

shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof *and all services in connection with* the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, or icing, *storage*, and hauling *of property transported*; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish *such transportation* upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto. All charges made for *any service rendered or to be rendered in the transportation* of passengers or property *as aforesaid, or in connection therewith*, shall be just and reasonable; and every unjust and unreasonable charge *for such service or any part thereof* is prohibited and declared to be unlawful'" (pp. 593-4). (Italics are those of the Court.)

Further, that the services which Dequesne performs are not a part of railroad transportation is also clear. On this it may assist the Court if we mention the case of *McLeod v. Threlkeld*, 319 U. S. 491. It arose under the Fair Labor Standards Act, and involved the question whether the services of a cook employed by contractors to serve meals to maintenance of way employes of a railway company was engaged in commerce under the terms of that act. This Court held in the negative, and said this:

> "Such a ruling under the Federal Employers' Liability Act, after the Bolle, Industrial Commission and Bezue cases, *supra*, note 9, should not govern our conclusions under the Fair Labor Standards Act. These three later cases limited the coverage of the Federal Employers' Liability Act to the actual operation of transportation and acts so closely related to transportation as to be themselves really a part of it. They recognized the fact that railroads carried commerce and were thus a part of it but that each employment that indirectly assisted the functioning of that transportation was not a part. The test under

this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it. Employee activities outside of this movement, so far as they are covered by wage-hour regulations, are governed by the other phrase, 'production of goods for commerce.'

"It is not important whether the employer, in this case the contractor, is engaged in interstate commerce. It is the work of the employee which is decisive. Here the employee supplies the personal needs of the maintenance-of-way men. Food is consumed apart from their work. The furnishing of Board seems to us as remote from commerce, in this instance, as in the cases where employees supply themselves. In one instance the food would be as necessary for the continuance of their labor as in the other" (pp. 496-7).

2. It is argued that the decisions of the Commerce Commission are inconsistent on the question of storage, and so do not furnish a clear guide as to the matter under controversy (R. B. Brief 14, 40-49). None of the authorities say that it is a carrier's duty to furnish commercial warehousing, such as is performed by Duquesne. All are to the contrary. There are services which are beyond the duty of a carrier to furnish but which are a part of railroad transportation when and if performed by the carrier. But in such cases and during those periods the goods are in possession of the carrier, and are subject to the carrier's bill of lading. (*In re Bills of Lading*, 52 I. C. C. 671.) This is so in all the cases relied upon by the Retirement Board. For instance, in the *American Warehousemen's Association* case, 188 I. C. C. 13, the goods were in possession of the barge line. *Storage in Transit at New Haven, Conn.*, 190 I. C. C. 209, was an I. & S. proceeding, and the tariff was not permitted to become

effective. But there the proposal was storage while the goods were in possession of the carrier by its agent, and also while they were under the bill of lading of the carrier. In *Storage at New London & Thamesville, Conn.*, 190 I. C. C. 213, the proposed storage was again while the goods were in possession of the carrier and being transported under the carrier's bill of lading. So also in *Western Transit Co.* v. *Leslie*, 242 U. S. 448. In *Storage of Cocoa Beans in New York District*, 231 I. C. C. 575, the goods were not in possession of the carriers at all. The question there was, for how long a period they could be kept in outside commercial storage before being shipped out by rail from the storage point. There is no inconsistency in the decisions of the Commission *on the point that* commercial storage in a warehouse operated by a separate company is not part of railroad transportation when the goods have been delivered to the warehouse by the carrier and the carrier's bill of lading has become spent.

II. The Argument That the Findings Of the Board Are Binding Upon This Court Is Untenable Because (1) the Findings Excepted To By Duquesne Are Not Findings Of Fact, and Also (2) Since They Go To the Jurisdiction Of the Board, the Court Is At Liberty To Reach Its Own Conclusion With Respect Thereto.

The Retirement Board in its brief (pp. 53-4) urges that the findings of the Board are controlling upon the Court. True, this is grounded on the contention that the interpretation placed upon the statutes by the Board is a reasonable one. The Brotherhood in its brief (pp. 39-40) claims persuasiveness on the ground of alleged consistent application by the Board. We answer as follows:

(*a*) Those parts of the findings of the Board to which we take exception are italicized in the appendix of our main brief. They are not fact findings at all. Their very text shows the fallacy of the argument that they are findings of fact. For instance, that portion of the third finding which says that "Duquesne's operations are now and have been at least since August 28, 1935, intimately and integrally related to Pennsylvania's railroad transportation" assumes to be a finding of fact but is nothing more than a conclusion drawn from stated facts which on a correct view of the law, fail entirely to support it.[1]

(*b*) The Retirement Act itself in Section 11, which is the part justifying the appeal, contains nothing as to the findings of the Board. In the Unemployment Act, Section 5 (f), it is provided that "the findings of the Board *as to the facts*, if supported by evidence and in the absence of fraud, shall be conclusive." (Italics supplied.) But it is also expressly provided in Section 5 (c) that the review of the Board's decisions shall be "subject to all provisions of law applicable to the review of such decisions." In any event, it is to be noted that the conclusiveness is *as to the facts* if supported by evidence, meaning of course substantial evidence (*National Labor R. Board* v. *Columbian E. & Stamping Co., Inc.*, 306 U. S. 292, 299). But the Board did not find any facts other than those submitted by Duquesne. To them the Board added its conclusions. And they do not fit.

It is argued (R. B. Brief 52) that support for the Board's position is found in such cases as *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 131; *Gray* v. *Powell*, 314 U. S. 402; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 145-6; and *United States* v. *Louisville & N. R. R. Co.*, 235 U. S. 314.

[1] What is meant by an integral part of railroad transportation can be gathered from the testimony of Mr. Eastman quoted on p. 28 of our main brief.

As to the *Hearst Publications* case, the majority opinion in the Second Circuit in the *Duquesne* case answered it in this way:

"* * * The opinion in Labor Board *v.* Hearst, the case mainly relied on here, makes clear the difference between that case and this. Pointing out that Congress, without defining it, had used a broad term 'employees' broadly, leaving to the Labor Board to determine its application in particular situations, the Court said,

> 'But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it intially, the reviewing court's function is limited.'

Citing decisions of similar purport, it then concludes:

> 'the board's determination * * * is to be accepted if it has "warrant in the record" and a reasonable basis in law.'

Here Congress did not use the term 'employer' broadly. On the contrary, it gave it a precise, a definite meaning. In this situation, the preceding sentence in the Hearst opinion, 'Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute,' furnishes the guiding rule * * *" (R. 308).

Gray v. *Powell* has been described as "a case which perhaps went as far as any other"—*Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. (2d) 787, at 792. But in the instant cases Duquesne did not go to the Retirement Board asking to have its status determined. The terms of the statute did not so require as in the *Gray* case. The Retirement Board initiated the proceeding, and of its own motion attempted to determine the status.

But the finality of the status has not by the terms of either the Retirement Act or the Unemployment Insurance Act been committed to the Retirement Board. Review is xpressly provided in both statutes.

In the *Rochester* case there was no question as to the power of the Federal Communications Commission to determine the question of control. But that case sustains the point, as here contended, that where there is no evidence to support the finding of the administrative body as to the facts, that finding will not be supported by the court.

In the *Louisville & Nashville* case, it is true that the facts were not disputed. But the issue was with respect to undue preference (Sec. 3 (1)) of the Commerce Act, and unjust discrimination (Sec. 2), same act. These, under the Commerce Act, are administrative matters exclusively within the jurisdiction of the Commission. And even in that case reliance is placed upon the earlier *Louisville & Nashville* case in 227 U. S. 88, where this Court said, "if there was no evidence to show that the rates were unreasonable, there was no justification to make the order" (p. 92).

More to the point at issue are these cases: *State of North Carolina* v. *United States*, U. S. (June 11, 1945); *Bingham's Trust v. Commissioner*, U. S. (April 27, 1945); *Security Flour Mills Co.* v. *Commissioner*, 321 U. S. 281, 286; *Helvering* v. *American Dental Co.*, 318 U. S. 322, 330.

(c) It is contended that the decision of the Board should not be disturbed because it is said the interpretation placed upon the statutes by the Board has been consistently followed by it (Brotherhood Brief, pp. 34, 39). The fact is the Board has been anything but consistent. It gave the correct interpretation in its report to Congress as appearing on page 47 of our main brief. It followed that in the *Ocean Steamship Company* case, 123 F. (2d) 469, 470. Thereafter it reversed itself in an effort to

ascend to the level set by the Commissioner of Internal Revenue. And while the Retirement Board now seeks to differentiate between the steamship cases and the instant cases (R. B. Brief 8-9), as also did the Appellate Court in No. 103 on another ground (R. No. 103, p. 86), it is important to note that the Retirement Board in its opinion in the *Ocean Steamship Company* case attempted no such distinction, but placed its decision on precisely the same grounds now urged in the instant cases.

> "In my opinion, it is established from all of the foregoing materials that Osco is and has been principally engaged in the performance of services in connection with the transportation of passengers and property by railroad, and the receipt, delivery, transfer in transit, and handling of property transported by railroad, within the meaning of Section 1 (a) of the Railroad Retirement and Railroad Unemployment Insurance Acts and Sections 202.07 and 202.08 of the Regulations. It is clear that in transporting traffic composed of freight and passengers interchanged with Central and other railroads and thus constituting an integral part of their rail water routes, Osco is engaged in the performance of a service which is reasonably directly related both functionally and economically to the performance by such railroads of their obligations as common carriers by railroad and which, therefore, constitutes a service in connection with the transportation of passengers and property by railroad. Board ruling of June 30, 1938, on *New England Steamship Company;* General Counsel's Opinion No. 1939 R. R. 7 on *Rutland Transit Company;* General Counsel's Opinion No. 1939 R. R. 112 on *Canada Atlantic Transit Company;* General Counsel's Opinion No. 1939 R. R. 117 on *Lake Erie Navigation Company;* my opinion of December 11, 1939, on *San Francisco and Portland Steamship Company,* L-39-817.
>
> "It is also clear that the terminal activities conducted by Osco in the handling of railroad interchanged freight consisting of the delivery and receipt of such freight, the discharging and loading of such

freight from ships, the loading, unloading, dunnaging, and bracing of railroad cars for the shipment of such freight, and the lighterage of inbound and outbound railroad interchange traffic, constitute the operation of equipment and facilities and the performance of services in connection with the receipt, delivery, transfer in transit, and handling of property transported by railroad within the meaning of the Acts and the Regulations. Indeed, such services have repeatedly been recognized as railroad transportation services. (Citing cases.) * * *"

Ocean Steamship Company of Savannah, R. R. B. Law Bulletin No. 2, 420, 436.

See also *Interstate Transit Lines v. United States*, 56 F. Supp. 332, 334.

There is further this highly important fact that the Retirement Board in the continued effort of two of its members to extend its coverage in these cases and related ones, has been arrayed and is now arrayed against not only what eight Federal courts have said but against the opinion, which appears to be unanimous, of the Social Security Board and its continued practice under the act which that Board administers. That Board has asked to have brought to the attention of the Court that it does not agree with the interpretation placed upon he Retirement and Unemployment Acts by the Retirement Board, and that it has not followed that interpretation in administering the Social Security Act. The position taken by the Social Security Board is set forth in Appendix E of the Railroad Retirement Board's brief, but it is of such importance that we quote part of it here.

"The Social Security Board takes the position, on the basis of the legislative history of the coverage definition, that Congress intended to confine the railroad legislation to the railroad industry, and not to extend it to segments of other industries, such as water or motor transportation, by reason of the ownership of the stock of companies engaged in such activities. That Board believes that the basic inten-

tion in framing the coverage defintion in the Railway Labor Act amendments of 1934 was to paraphrase the definition of 'transportation' in section 1 (3) of the Interstate Commerce Act; and that the only reason for departing in this respect from the original draft, which had in terms referred to the Commerce Act definition, was the objection by the chairman of the Senate committee to a technique of draftsmanship which required reference to another act (Senate Hearings on S. 3266, 73d Cong., 2d Sess., pp. 10-11, 145-6). The Social Security Board has recognized that this interpretation cannot be applied rigidly in all cases, and has not applied it in the few instances that have come before that Board in which a railroad company has turned over to a subsidiary a part of the normal railroad operation, such as maintenance of equipment. Its position is that the Congressional intention to cover these occasional cases does not outweigh the evidence that the general rule to be applied in other situations was meant to be that of the Interstate Commerce Act definition.

. . . . . .

"The Social Security Board's interpretation of the act is the same as that adopted by the Circuit Court of Appeals for the Fifth Circuit in *Ocean Steamship Company of Savannah* v. *Allen*, 123 F. (2d) 469; the Circuit Court of Appeals for the Fourth Circuit in *Walling* v. *Baltimore Steam Packet Company*, 144 F. (2d). 130, the majority of the Court below in number 95, reported at 148 F. (2d) 473, and the Federal District Court for the District of Nebraska in *Interstate Transit Lines* v. *United States*, 56 Fed. Supp. 332.

"The Social Security Board calls attention to the fact that its decisions are entitled, upon judicial review to as great a measure of finality as are those of the Railroad Retirement Board (see Social Security Act, as amended, sec. 205 (g); 42 U. S. C. sec. 405 (g))" (pp. 84-86).

(d) *The question to be determined from the undisputed facts in these cases is one of jurisdiction*, and by neither of these statutes have the courts been shorn of

their power to judge. The precise question came before the Circuit Court of Appeals for the Tenth Circuit in *Utah Copper Co.* v. *Railroad Retirement Board*, 129 F. (2d) 358. In rejecting the position taken by the Retirement Board there, and now asserted here, that court said this:

> "The Railroad Retirement Act is silent on the power of the Board to pass upon the question of jurisdiction. The question is of course present in all proceedings before the Board and must of necessity be decided before the Board can proceed. But in the absence of a specific provision in the act, expressly lodging the decision of the jurisdictional question in the Board, its decision, even if supported by competent evidence, is not final and may be independently examined by a court of review. The court was therefore in error in dismissing the proceedings on the ground that the decision of the Board in this respect was final because supported by competent evidence" (pp. 361-2).

Certiorari was denied, 317 U. S. 687.

See also *United States* v. *State of Idaho*, 298 U. S. 105.

We find no difficulty with cases relied upon by the Retirement Board, such as the *South* and *Watts* cases referred to in footnote 49 on pp. 53-4 of its brief. They are not in point. There the questions at issue were purely administrative—whether in an employment relation to a carrier. And curiously enough, the opinions in both of those cases were written by the same judge who wrote the prevailing opinion in No. 95.

III. The Reports Of the Senate And House Committees Are Not At Variance With What Was Said By the Witnesses At the Hearings Before Those Committees; And Lend No Support To the Position Taken By the Retirement Board and the Brotherhood.

The Retirement Board on brief (pp. 31-2) and the Brotherhood also on brief (p. 25) seek support in these

reports for the construction placed by them upon the employer definition in the statutes. The more particular language relied upon is this from the Senate report:

> "By these changes there are brought within the scope of the act substantially all those organizations which are intimately related to the transportation of passengers or property by railroad in the United States." (Senate Report on S. 2395, 75th Congress, 1st Session, p. 7.)[1]

It is essential to note that this language as expressly stated has reference only to "these changes" which mean the changes made in the 1937 Act as compared with the 1935 Act.[2] In framing the 1937 Act, the Act of 1935 was not repealed. It was amended. And the amendment did these three things:

First. In the 1935 Act trucking service was excluded. The 1937 amendment extended this by adding casual service and the casual operation of equipment or facilities. The amended wording is this: "except trucking service,

[1] This is from the House report on H. R. 7519, 75th Congress, 1st Session, June 18, 1937.

"The present act (sec. 215) embraces within its scope 'any company which may be directly or indirectly owned (by a carrier) or controlled thereby or under common control therewith, and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of and operating the business of any such "carrier". This language has been changed so as to make certain the inclusion of a company or companies owned or controlled in common by several companies. The pending bill also excludes casual service and the casual operation of equipment or facilities" (p. 2).

[2] The definition of "carrier" (employer) insofar as material was this:

"The term 'carrier' means any express company, sleeping-car company, or carrier by railroad, subject to the Interstate Commerce Act, and any company which may be directly or indirectly owned or controlled thereby or under common control therewith, and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, * * *" (49 Stat. 967).

casual service, and the casual operation of equipment or facilities."

Second. In the 1935 Act ownership or control of these affiliated companies was that of one carrier. This was changed in the 1937 Act to "one or more such carriers." As amended the language is this: "and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith." The same Senate report referred to above expressly mentions this change in this language:

> "* * * This language has been clarified to make it clear that coverage extends to a company which is owned or controlled in common by several companies. * * *" (p. 7).

Third. The following associations and organizations not covered at all in the 1935 Retirement Act were included in the 1937 Act in this language: "railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services *in connection with or incidental to* railroad transportation." (Italics supplied.)

It is to be noted that as to those associations just above mentioned the relationship is "in connection with or incidental to" and not just "in connection with" as in the case of the subsidiary companies. It will thus be seen that the earlier part of the report had already in a separate paragraph spoken of these companies owned or controlled by one or more carriers: and what the report meant in speaking of "all those organizations which are intimately related to the transportation of passengers or property by railroad" was those associations or organizations such as traffic associations and tariff bureaus

whose services are *in connection with or incidental to* railroad transportation. As thus explained, the meaning of that part of the report on which reliance is placed both by the Retirement Board and the Brotherhood is clear.

Stress is placed also by the Retirement Board in its brief (pp. 32-33) upon the statement made by Senator Wagner on the floor of the Senate with respect to the Retirement Bill as being applicable to "storage and other facilities", obviously meaning of the carriers. But the warehouses of Duquesne are not facilities of Pennsylvania. A related situation where an affiliate of the carriers owned property at Detroit, unloaded cars of perishable freight, and furnished display and sales privileges to dealers, was specifically held not to be a facility of the railroads. In that case the Interstate Commerce Commission said this:

> "Transportation of produce into the Produce terminal was discussed by division 2 in *Reciprocal Switching at Detroit*, 215 I. C. C. 284, wherein increased switching charges were found not justified. The division said at pages 287 and 288:
>
> 'The produce terminal is not taxed under the laws of the State of Michigan as property devoted to railroad purposes, but the auxiliary yard is so taxed. The Green Real Estate Company makes a charge of $4 per car for the labor furnished in unloading cars at the terminal buildings, and a like charge is made when cars are sold and unloaded at the platforms. These charges, protestants point out, are not on file with this Commission. Transportation of this traffic ends when the cars are placed by the Union Belt in the produce terminal. The Green Real Estate Company is not subject to the Interstate Commerce Act and the charges referred to are for nontransportation services. It follows that these charges are not subject to our jurisdiction and there is no requirement that they be published and filed.'
>
> . . . . . .

"*Conclusions.*—We find that facilities provided for the display and sale of perishable produce delivered at the produce terminal are facilities for commercial transactions not part of transportation, and therefore not subject to regulation under the provisions of the act.

"We further find that defendants were and are obligated to deliver perishable produce at the produce terminal when delivery is desired for the purpose of using the commercial facilities for display and sale of the produce, and in the event that consignees were and are entitled to the use of these facilities under the law applicable to their use."

Growers Marketing Co. v. *Pere Marquette Ry. Co.*, 248 I. C. C. 215, 227.

The corresponding statement from the Chairman of the House Committee and who sponsored the bill on the floor of the House was this:

"I will not attempt to make a detailed analysis of the provisions of the bill but will roughly refer to some of its important features.

"Employers

"Employers subject to the act are express companies, sleeping-car companies, rail carriers subject to the Interstate Commerce Act, companies controlled by one or more of the employers in the transportation business or in railway service, and certain railroad and labor organizations having slightly less than 4,000 employees, which are also treated as employers in the bill."

(81 Congressional Record, Part 6, p. 6081.)

CONCLUSION.

For the further reasons appearing in this reply memorandum, it is asked that the judgment of the Circuit Court of Appeals for the Second Circuit be affirmed in No. 95, and the judgment of the United States Court of

Appeals for the District of Columbia be reversed, and that of the District Court of the United States for the District of Columbia be affirmed in No. 103.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945

No. 95

RAILROAD RETIREMENT BOARD ET AL., *appellants*

v.

DUQUESNE WAREHOUSE COMPANY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

No. 103

DUQUESNE WAREHOUSE COMPANY, *appellant*

v.

RAILROAD RETIREMENT BOARD ET AL.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

---

BRIEF OF THE AMERICAN WAREHOUSEMEN'S ASSOCIATION, AS AMICUS CURIAE

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RAILROAD RETIREMENT BOARD ET AL.

BRIEF OF THE AMERICAN WAREHOUSEMEN'S ASSOCIATION, AS AMICUS CURIAE

---

1. REFERENCE TO THE OPINIONS DELIVERED IN THE COURTS BELOW.

In No. 95.—The opinion of the Circuit Court of Appeals, Second Circuit, (R. 302) is reported at 148 F. 2d 473. This opinion affirmed the judgment of the District Court for the Southern District of New York (R. 282) reported at 56 F. Supp. 87, which reversed the decision of the Railroad Retirement Board dated February 11, 1943 (R. 19-45).

In No. 103.—The opinion of the United States Court of Appeals for the District of Columbia (R. 81) is reported at 149 F. 2d 507. This opinion affirmed the final decision of the Railroad Retirement Board and reversed the judg-

ment of the District Court for the District of Columbia (R. 71-73) rendered March 21, 1944, not reported. The District Court reversed the decision of the Railroad Retirement Board dated June 15, 1943 (R. 36-44).

2. PERTINENT PROVISIONS OF STATUTES INVOLVED.

The pertinent provisions of the Railroad Retirement Act of 1937, U.S.C. Title 45, Sec. 228(a), are as follows:

PART I.

That the Act of August 29, 1935, entitled "An Act to establish a retirement system for employees of carriers subject to the Interstate Commerce Act, and for other purposes", be, and it is hereby, amended to read as follows:

DEFINITIONS.

Section 1. For the purposes of this Act—

(a) The term "employer" means any carrier (as defined in subsection (m) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage; or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: *Provided, however*, That the term "employer" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-

railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Board, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "employer" shall also include railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation; and railway labor organizations, national in scope, which have been or may be organized in accordance with the provisions of the Railway Labor Act, as amended, and their State and National legislative committees and their general committees and their insurance departments and their local lodges and divisions, established pursuant to the constitution and bylaws of such organizations.

* * * * * * *

(m) The term "carrier" means an express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act.

As the statutory provisions quoted above are the same as Section 1(a)(b) of the Railroad Unemployment Insurance Act, U.S.C. Title 45, Sec. 351(a), it is not necessary to reproduce the Railroad Unemployment Insurance Act provisions herein. We shall refer to these two acts as the railroad employment acts.

The pertinent provisions of the Interstate Commerce Act, as amended, U.S.C. Title 49, Sec. 1(3)(a), read as follows:

Sec. 1. (3)(a) The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all per-

sons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier". The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this part includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

3. STATEMENT OF THE GROUNDS AND REASONS OF THE AMERICAN WAREHOUSEMEN'S ASSOCIATION, AMICUS CURIAE, FOR SUBMITTING THIS BRIEF.

The American Warehousemen's Association, as *amicus curiae,* shows herein that a decision by this Court sustaining the findings and conclusions of the Railroad Retirement Board in these two cases will, as a precedent, have a broad national effect. Such a decision will have a disturbing effect upon virtually all public warehouses in this country.

The American Warehousemen's Association, general office 222 West Adams Street, Chicago, Illinois, has more than 800 members who operate cold storage warehouses and non-refrigerated warehouses at many locations in each of the 48 states. These warehouse companies are engaged in public warehousing and the commercial storage of merchandise which is well described in the report of the Interstate Commerce Commission in *New York Warehousing*, 198 I. C. C. 134.

The warehouse companies are dependent upon the railroads for essential transportation service and in their dealings with the railroads the relationship is that of common carriers and shippers. The warehouses are the storage and shipping plants for the many customers of each warehouse. The shipping group is composed of the warehouse companies acting in conjunction with their customers, the consignors, consignees and rate payers of railroad transported shipments. Warehouse companies are shippers. *Warehouse Company* v. *United States*, 283 U. S. 501, 505-506.

The Board's findings, opinion and conclusions evidently mean that (1) all of the business activities of the Duquesne Company, including all of the going business of this private industry, are common carrier transportation services of the Pennsylvania Railroad Company; (2) the warehouses, offices and all real and personal property and equipment of the Duquesne Company are common carrier facilities and equipment utilized in the common carrier transportation services of that railroad company; and (3) all of the officers and employees of the Duquesne Company are in substance employed by the railroad company. There is no reference to facts or statutory provisions that adequately supports these sweeping conclusions. Section 1(a) of the railroad employment acts covers the extensive transportation services of a line haul railroad company and the

relatively small services incidental thereto such as the icing of refrigerator cars enroute and customary terminal services which such a line haul carrier may allot to an owned or controlled company or to a contractor. The Board's findings transcend this limited statutory authorization.

The effects of a final decision in these cases will extend beyond the interests of the Duquesne Company and its employees to the commercial warehouse industry throughout this country. This widespread effect will arise in several, including the following respects:

1. If the final decision is that commercial warehouse services performed by warehouse companies on their private premises are common carrier railroad transportation services when performed by an owned or controlled warehouse company such decision will be very disturbing in the following respects:

(a) If such services are declared to be railroad transportation services *per se*, will other warehouse companies, manufacturers, wholesalers and retailers, in which railroads have no pecuniary interest, who also perform such services, be transferred from coverage by the Social Security Act to employers under the railroad employment acts on the grounds that they perform services which have been found to be common carrier railroad transportation terminal services? Compare with *Union Stock Yard & T. Co.* v. *United States*, 308 U. S. 213, 220-221. The Board has not distinguished the storage and freight handling services of these non-railroad companies from the storage and freight handling services of an owned or controlled company.

(b) If such services are so declared to be railroad transportation services *per se* will the warehouse companies and these other shippers have any remaining protection from unjust discrimination by virtue of the provisions of Sec-

tions 2 and 3 of the Interstate Commerce Act, Part I? We raise this question because it is very doubtful that an owned or controlled warehouse company performing what are declared to be common carrier transportation services can be deemed to be a competitor of other warehouse companies, not owned or controlled by any railroad, who perform the same services as a component of their private business activities. The point is that the competition evidently will not be under similar circumstances and conditions.

2. A final decision that ordinary commercial storage performed by any warehouse company on non-railroad premises for the sole use, benefit and profit of traders, which is not a component of railroad transportation service, will have a disturbing effect upon virtually every cold storage warehouse company and non-refrigerated warehouse company in this country. Litigation will be aroused —not settled.

3. The findings by the Board, if approved by the courts, that commercial warehouse and storage services of an owned or controlled warehouse company are common carrier transportation services, in direct opposition to the rulings of the Interstate Commerce Commission will create conflicts with the administration of the Interstate Commerce Act that will be disturbing to the whole commercial warehouse industry of this country.

4. STATEMENT OF THE CASE.

The main issue herein is—is the Duquesne Company an employer within the meaning of Section 1(a) of the two railroad employment acts in that it is an owned and controlled company which operates equipment and facilities and performs certain services specified in that section. The services are—

"in connection with the transportation of passengers or property by railroad or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage or handling of property transported by railroad."

In No. 95. The Railroad Retirement Board, in its findings of fact, conclusions and opinion found that the Duquesne Warehouse Company, the appellee herein, is an employer, as to all of its real and personal property, equipment and business activities, within the meaning of Section 1(a) of the Railroad Retirement Act. (R. 19-45). This has reference to retirement benefits sometimes called old age pensions.

These findings, if sustained, will transfer the Duquesne Company, and all of its officers and employees, from coverage by the Social Security Act to coverage by the Railroad Retirement Act.

In the United States District Court, for the Southern District of New York, the Duquesne Warehouse Company instituted the proceeding under Section 11 of the Railroad Retirement Act to set aside the decision of the Board. The Court entered judgment ordering the decision of the Board set aside and annulled. (R. 282). (56 F. Supp. 87).

The Circuit Court of Appeals, for the Second Circuit, in 148 F. 2d 473, affirmed the judgment of the District Court. (R. 302).

The case is before this Court on certiorari granted on June 11, 1945. (R. 329).

In No. 103. The Railroad Retirement Board, in its 14 findings of fact, conclusions and opinion found that the Duquesne Warehouse Company, the appellant herein, is an employer, as to all of its real and personal property, equipment and business activities, within the meaning of Section 1(a) of the Railroad Unemployment Insurance Act. (R. 36-44).

These findings, if sustained, will transfer the Duquesne Company, as to unemployment insurance, from coverage under the Social Security Act and state acts to coverage under the Railroad Unemployment Insurance Act.

In the United States District Court, for the District of Columbia, (opinion of March 21, 1944, not reported) the Duquesne Warehouse Company instituted the proceeding under Section 5 of the Railroad Unemployment Insurance Act to set aside the final decision of the Board. The court reversed the findings and action of the Board. (R. 71-73).

The United States Court of Appeals, for the District of Columbia in 149 F. 2d 507, reversed the judgment of the District Court and affirmed the final decision of the Board. (R. 81).

The case is before this Court on certiorari granted on June 11, 1945. (R. 88).

The Duquesne Warehouse Company, incorporated in Pennsylvania, is a private corporation which is authorized to engage, and it is engaged, in the public warehousing business, a well-known private business activity. It operates a warehouse at Pittsburgh, Pa., and another warehouse at East Liberty, Pa. Both warehouses are equipped with side tracks which are connected with the railroad lines of the Pennsylvania Railroad Company. The customers of the Duquesne Company in carrying on their private business activities ship substantial quantities of merchandise in carloads and less-than-carload lots outbound from the Duquesne Company's warehouses via the Pennsylvania Railroad and cause substantial quantities of merchandise to be transported via the Pennsylvania Railroad, in carloads and less-than-carload lots, inbound to the warehouses. The Duquesne Company, in cooperation with its many customers, participates in that shipping of freight to and from its warehouses by railroad and also by the means of common carrier and contract motor trucks. There

is no evidence showing that the Duquesne Company controls the routing, or exercised the right to route, this freight traffic.

The Pennsylvania Railroad Company owns the physical warehouses and the side tracks which it has leased to the Duquesne Company at a substantial annual rental. (No. 95, R. 66). The railroad company also owns the capital stock of the Duquesne Company. The company is separately operated and managed. Its operations are under the direction of a superintendent "who has full and unrestricted authority to conduct a commercial warehouse business in accordance with the charter of the company" (No. 95, R. 137). The record is wholly devoid of any evidence whatever as to exercise by the railroad company of control in the management of the warehouse company.

After reviewing the evidence, the American Warehousemen's Association, as *amicus curiae*, concluded that the Duquesne Company is engaged exclusively in private business activities; that it has not operated any facilities or equipment or performed any railroad transportation services within the meaning of Section 1(a) of the two railroad employment acts; that its business transactions with the railroad company as to real property were and are that of lessor and lessee and as to merchandise transported that of common carrier and shipper. Further that it, the Duquesne Company, has handled only the freight of its customers on its private premises and it has not handled any freight of the railroad company on railroad premises or elsewhere under any master and servant or principal and agent contract or arrangement of any kind.

Therefore our conclusions are that the Duquesne Company is not an employer within the meaning of the two railroad employment acts and that the Board's findings and action, as alleged by the Duquesne Company, are not in accordance with the facts; are unsupported by the evi-

dence of record; are contrary to the evidence of record and are arbitrary, capricious and contrary to law.

We submit that this Court should—

In No. 95. (a) Find that the Board's findings, conclusions and opinion are not supported by the evidence, and are arbitrary and invalid.

(b) Affirm the opinion of the Circuit Court of Appeals, Second Circuit.

In No. 103. (a) Find that the Board's findings, conclusions and opinion are not supported by the evidence, and are arbitrary and invalid.

(b) Reverse the opinion of the Court of Appeals of the District of Columbia.

(c) Affirm the judgment of the District Court for the District of Columbia.

5. SUMMARY OF ARGUMENT.

The Board's findings and conclusions in both cases, No. 95 and No. 103, are arbitrary and invalid in that they are without substantial support in the evidence; are contrary to the evidence; and reflect errors of law. In No. 95 the opinion of the Circuit Court of Appeals, Second Circuit, should be sustained, and in No. 103 the opinion of the Court of Appeals of the District of Columbia should be reversed in this Court, and the judgment of the lower court affirmed.

Legislative intention to confine the application of the two railroad employment acts strictly to common carrier transportation service is clearly expressed in the opening paragraph of Part I thereof; also in Sections 1(m) and 1(b) of these acts, and is repeatedly expressed in Section 1(a) thereof. Likewise in the history of this legislation. *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330.

Such legislative intention is also evinced in the Social

Security Act, which covers all private industry and which became effective, as to salaries and wages earned, on January 1, 1937, the same date that the Carriers Taxing Act became effective on salaries and wages. *Helvering* v. *Davis*, 301 U. S. 619. There is no indication of legislative intention to give the Railroad Retirement Board any jurisdiction whatever over private industry or private business activities, thereby curtailing the scope of the Social Security Act.

The Duquesne Company is a private industry engaged exclusively in private business pursuits on its private premises. The Railroad Retirement Board has no statutory jurisdiction of an owned company insofar as it is engaged in private business activities. In such case the Social Security Act applies.

The business transactions between the railroad company and the Duquesne Company have been and are those of common carrier and shipper which did not bring the Duquesne Company within the scope of Section 1(a) of the railroad employment acts. The two companies were and are sufficiently separated. *United States* v. *Lehigh V. R. Co.*, 220 U. S. 257; *United States* v. *Elgin, J. & E. Ry. Co.*, 298 U. S. 492; *Portland Traction Co.*, 237 I. C. C. 647, 650.

The railroad company itself performed and performs all of the transportation services, specified in Section 1(a) of the railroad employment acts, on its own premises leaving none of such services for performance by the Duquesne Company.

The loading and unloading of railroad cars and the storage of merchandise by private industries, including warehouse companies, on their private premises, dissociated from common carrier service and duty, as is the case here, does not evince the performance of any transportation service within the meaning of Section 1(a) of the railroad employment acts. *Loading and Unloading*

Carload Freight, 101 I. C. C. 394, 396; *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501.

A commingling of the business activities of the transporter and the trader, provided retirement act taxes are paid, as sanctioned in the findings of the Board, would create violations of the Interstate Commerce Act. *United States* v. *American S. & T. Plate Co.*, 301 U. S. 402; *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257; *United States* v. *Elgin, Joliet & Eastern R. Co.*, 298 U. S. 492.

6. ARGUMENT.

POINT I.

THE BOARD'S FINDINGS AND CONCLUSIONS ARE WITHOUT SUBSTANTIAL SUPPORT IN THE EVIDENCE.

(a) Contrary to the Board's Findings and Conclusions the Evidence calls for Findings that the Business Transactions between the Railroad Company and the Duquesne Company are those of Common Carrier and Shipper.

The failure of the Board to distinguish the transportation services, which are specified in fine detail in Section 1(a) of the railroad employment acts, from shippers' services, services which are a component of private business activities, is revealed clearly in the Board's summary of its findings as follows: (No. 95, R. 27-28)

> "As appears in our findings Duquesne is principally engaged in the following activities: (1) loading and unloading of carload freight transported over the Pennsylvania's lines, (2) receipt and delivery of carload freight, and less-than-carload freight transported over Pennsylvania's rails, (3) storage of goods under Pennsylvania's storage-in-transit privileges, (4) storage of goods coming in or going out, or both, over

Pennsylvania's rails and (5) handling Pennsylvania's damaged and over freight. In our opinion, all of these activities are clearly included within the language of Section 1(a) of the Act enumerating the activities which will qualify a carrier affiliated company an an employer.

"It is evident that the first three activities are performed in connection with the 'receipt', 'delivery', 'transfer in transit', 'storage' and 'handling' of property transported by railroad. In fact when Duquesne loads, and unloads, receives and delivers, stores and otherwise handles goods under Pennsylvania's storage-in-transit privileges it not merely performs services 'in connection with' transfer in transit but it *transfers in transit.* See *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U. S. 498, 526-527; *Storage of Cocoa Beans in New York District*, 231 I. C. C. 575, 577. * * *

"It is also clear, in our opinion, that under the circumstances of this case the functions and activities of Duquesne as to the storage of goods which are not in transit but which have been transported or are awaiting transportation over Pennsylvania's lines constitute services 'in connection with the transportation of * * * property by railroad.' * * *"

Contrary to the Board's findings these services are not railroad transportation services. The first two items, in the absence of exceptional and unusual conditions, are ordinary and customary shippers' services, i. e., private business activities. *Loading and Unloading of Carload Freight*, 101 I. C. C. 394, 396. *Merchants Warehouse Company* v. *United States*, 283 U. S. 501. The third and fourth items, commercial storage and so-called storage-in-transit of merchandise, as argued in our Points IV and V are also private business activities. The Board's summation is simply a recital of private business activities.

Of course these shippers' services are just as much "in connection with" motor truck transportation, which is not

covered by the railroad employment acts, as they may be "in connection with" railroad transportation. See the Board's finding No. 6. In either event they are shippers' services *per se* which stand erect on their own feet beyond the scope of the railroad employment acts. They were performed by the Duquesne Company, when functioning as a shipper, of its own volition on its own premises for its own benefit and profit. Every such shipper and its employees fall directly within the coverage of the Social Security Act. The term "in connection with" will not defeat this plain and direct application of the Social Security Act. In *Walling* v. *Baltimore Steam Packet Company*, 144 F. 2d 130, 133-135, C. C. A. Fourth Circuit, the court said that if Congress intended that steamship companies and their employees should be included under the special railroad insurance system instead of the general social security insurance system Congress could easily and would have said so. And we may properly remark—likewise as to warehouse companies and other shippers.

In No. 103 ten of the Board's findings, those numbered 3, 4, 5, 6, 7, 9, 10, 11, 13 and 14 constitute the whole factual foundation for the Board's conclusions in respect to the services performed by the Duquesne Company.

What is the evidence, if any, that supports these 10 findings? There was no public hearing at which witnesses were examined or cross-examined. The Board preferred to assemble the evidence by means of two questionnaires answered in writing by the Duquesne Company, and more particularly by two separate statements of facts submitted in writing by that company and two affidavits and their attachments. (No. 95, R. 58-99, 103-110, 131-139, 178-232.) Evidence of this kind has its advantages—it stands uncontradicted, and can have only the force and meaning which the respondent expressly attributed to it. Further, it enables the case to come before this court on facts which

are undisputed. The court is thus not shackled by the findings of the Board, but is at liberty to review the evidence and to determine the controversy as a matter of law. *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 373.

The lawful status of the Duquesne Company as a tenant in possession of the warehouse properties, for which it pays substantial rentals, stands unchallenged in the evidence and the findings of the Board.

Insofar as that evidence portrays other business transactions between the Duquesne Company and the Pennsylvania Railroad Company it can be concisely summarized as follows—the Duquesne Company's customers, functioning as consignors, tendered shipments of freight for transportation outbound by the railroad company and, functioning as consignees, accepted inbound shipments when they were tendered and delivered to the warehouses by the railroad company. The warehouses were the storage and shipping plants of these shippers. No divergence from the well-known similar functioning of a majority of the manufacturers, wholesalers and retailers in conjunction with railroad companies every business day throughout this country is evinced in this evidence.

There is no evidence that certain lots of merchandise, formed into carload or less-than-carload railroad shipments, passed through the warehouses of the Duquesne Company intact. The trade processing of the merchandise in the warehouses altered such railroad shipment assemblages and forbids the thought that the warehouses were agencies of the railroad company or its conduits for the delivery of inbound shipments by the railroad company directly and intact to unnamed consignees or for the direct tendering of outbound shipments by unnamed consignors to the railroad company. To the contrary, the warehouse company functioned as an agency of its own customers, such consignees and consignors, and provided their storage and shipping plant services.

As to less-than-carload shipments the railroad company itself unloaded the inbound shipments from, and loaded the outbound shipments into, the cars, thus conforming with ordinary and regular practice. And it does so now.

The Board's findings 5 and 6 show that the handling and storage activities of the Duquesne Company are services which are performed by it for the account of the shippers and owners of the merchandise and the charges for such services are billed by the Duquesne Company directly against and collected by it from these owners of the merchandise. Thus the warehouse activities stand out separate and distinct from, and additional to, the railroad transportation services which are performed at the published tariff rates of the railroad company. (No. 95, R. 22).

The complete absence of evidence to support these 10 findings is striking. There is no evidence whatever of a master and servant or principal and agent arrangement under which the Duquesne Company handles any of the railroad company's freight in the performance of a task laid down by the railroad company for performance by the Duquesne Company. There is no evidence that the Duquesne Company performs any services specified in Section 1(a) of the railroad employment acts which are included in the common carrier transportation duty of the railroad company. There is no evidence which tends to show that the business activities of the Duquesne Company, all of which are performed on its private premises and not on railroad premises, are not private business activities and that it and all of its employees are not properly within the coverage of the Social Security Act. There is no evidence relevant to Section 1(a) of the railroad employment acts, such as employment in railroad transportation services, or that the purpose of these acts will be served by including employees of private industry within the scope thereof.

Turning to finding of fact No. 1. The Board found that since its incorporation the Duquesne Company has been

directly and completely owned and controlled, through stock ownership, by the Pennsylvania Railroad Company. If the Board had adhered to the evidence it would have found that the railroad company owned all of the capital stock of the Duquesne Company which, in the decided cases, means far less than the Board found. *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257; *United States* v. *Elgin, Joliet & Eastern R. Co.*, 298 U. S. 492. However, the ownership in this case is ownership by the railroad company of the capital stock of a warehouse company engaged exclusively in private business activities—an ownership which is beyond the scope of Section 1(a) of the two railroad employment acts.

Finding No. 2. The Board found that certain officers of the Duquesne Company are also officers of the railroad company. This is immaterial for the reasons stated in our review of finding 1.

Finding 8 indicates that under arrangements with the railroad company the Duquesne Company stores and sells the refused and unclaimed freight, of relatively small value in the aggregate, of the railroad company. But, without a word to indicate why that ordinary business transaction is relevant to the railroad employment acts, the Board proceeded to its unfounded conclusion that it is. We cannot discern the slightest relevancy in finding 8 to the railroad employment, retirement benefits or other purposes of the railroad employment acts. Whenever the railroads encounter the refusal of consignees to accept the delivery of transported carloads of perishable watermelons, strawberries or fruit will the commission merchant who undertakes the distressed sale be thereby converted into an employer under the railroad employment acts? The railroad employment acts do not evince legislative intention to transform such vendors of merchandise into railroad employers.

The Board's findings also are to the effect that the operations of the Duquesne Company are intimately and integrally related, and directly related, functionally and economically, to the operations of the railroad company. Findings 3 and 13. These vague terms are not relevant to Section 1(a) of the railroad employment acts. Valid findings must descend to the services which are specified in that section—the findings must show that the Duquesne Company "handled" or "elevated" freight, for and in the behalf of the railroad company, while the freight was in the possession of the railroad company. These vague, general phrases could also be applied to many manufacturers or wholesalers, not owned or controlled by a railroad company, who as ordinary shippers are dependent on some railroad company for essential transportation service.

That part of the Board's finding No. 9 which has reference to the subleasing, by the Duquesne Company, of space to manufacturing concerns rests on what is indisputably private business activities. As Section 1(a) of the railroad employment acts is confined to specified, and singled out, transportation services the Board does not have the broad *in personam* statutory authority to find that an owned company, if it is engaged both in private business pursuits and the performance of specified railway transportation services, is covered by the railroad employment acts as to all of its property, equipment and business activities. In such case the owned company would be covered in part by the Social Security Act and in part by the railroad employment acts and the allocation of its employment service must conform with Section 1426(c) of the Internal Revenue Code.[1] Here the Duquesne Company is engaged exclusively in private business. Nevertheless, transcending its statutory authority the Board found that the Duquesne Company

[1] For pay period allocations see Sec. 402.207 of Bureau of Internal Revenue Regulations No. 106.

was and is an employer under the railroad employment acts as to all of its business activities including the private business transactions between the Duquesne Company and the manufacturers. The Board is likewise in error in ignoring the application of the Social Security Act and treating the commercial storage and storage-in-transit services afforded by the Duquesne Company, which are private business activities, as being railroad transportation services—a question which we argue in our Point IV. These are not minor details for administrative rulings—Congress deliberately withheld all jurisdiction over private business under any and all conditions from the Railroad Retirement Board and, in the Social Security Act, gave such jurisdiction to the Social Security Board.

The remaining finding, No. 12, is not relevant to these cases which involve only the private business activities of a private industry.

The Board's findings, therefore, are arbitrary and invalid in that they derive no support from the evidence of record and are contrary to the evidence.

The Board's findings and conclusions in both No. 95 and No. 103 are based upon the same evidence. (No. 103, R. 89-90.) Three courts found that the evidence failed to substantiate the findings. In No. 103 the District Court of the District of Columbia on March 21, 1944. (R. 71-73.) In No. 95, the District Court of the Southern District of New York (R. 282), 56 F. Supp. 87, and the Circuit Court of Appeals, Second Circuit (R. 302), 148 F. 2d 473. The Court of Appeals of the District of Columbia, as stated in our argument of point III, accepted the findings of the Board in No. 103 at their face value without giving consideration to the sufficiency or materiality of the underlying evidence.

(b) The Board's Findings of Fact and Conclusions are contrary to (1) the Interstate Commerce Act, (2) the Evidence, and (3) the Filed and Published Tariffs of the Railroad Company.

The railroad company, owner of the physical warehouses at Pittsburgh and East Liberty which are equipped with private side tracks, leased this property to the Duquesne Company. (No. 103, R. 39.) The Duquesne Company, a private corporation, thereupon became the tenant of this property and the property became the private property of this private industry. We say private property as to the side tracks because the leasing provided the equivalent, in rights, which the Duquesne Company was entitled to under the private side track provisions of Section 1(9) of the Interstate Commerce Act, part b. (No. 95, R. 134.) The Duquesne Company, therefore, did not and does not operate any equipment or facility, devoted to the transportation services of the railroad company. It assumed the status accorded to shippers in Section 1(9) of the Interstate Commerce Act. *Schlicher* v. *Director General*, 62 I. C. C. 179, 187; *Los Angeles Switching Case*, 234 U. S. 294. And the valuation report of the Interstate Commerce Commission classified this property as non-transportation property. (No. 95, R. 139.) The business transactions of the Duquesne Company with its customers are covered by standard negotiable and non-negotiable warehouse receipts which conform with the statutes of the Commonwealth of Pennsylvania. (No. 95, R. 133, 168-169.) None of the business activities of the Duquesne Company with its customers were conducted under the terms of the uniform railroad bill of lading.

The services described in the Board's findings 5 and 6 are not railroad transportation services, and necessarily are private business activities by virtue of Rules 23 and 27 of

the railroad company's Consolidated Freight Classification. Neither the Board nor the Pennsylvania Railroad Company has authority to change or alter that unyielding condition. The railroad tariffs while in force are as rigid as a statute. *Pennsylvania R. Co.* v. *International Coal M. Co.*, 230 U. S. 184, 197; *Davis* v. *Henderson*, 266 U. S. 92. Only the Interstate Commerce Commission, after hearing, can alter railroad tariffs in the manner here attempted by the Board without statutory authority.

The duties of the railroad company and the Duquesne Company, respectively, in handling the freight of the Duquesne Company to and from the railroad cars on the side tracks at the warehouses is set forth in Rule 27 of the Consolidated Freight Classification of the railroad company, its filed and published tariff, which reads as follows (No. 95, R. 135):

> "Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at C. L. ratings or rates, except where the tariff of the carrier at point of origin or destination or stopover station (as the case may be) provides for the loading or unloading of C. L. freight by carrier."

The evidence shows that the two parties complied with Rule 27. (No. 95, R. 134, 136.)

The shipments of freight to and from the warehouses of the Duquesne Company are covered by the uniform bills of lading of the railroad company. (No. 95, R. 134-135, 170-171.) One of the clauses of the bills of lading obligate the common carriers to transport the shipments to or from the customary place of shipment and delivery. (No. 95, R. 170-171.) And the evidence shows that the side tracks at the warehouses are the customary place. (No. 95, R. 134.) Another clause in the bills of lading (No. 95, R. 170) provided that the bills of lading are subject to the railroad company's classifications and tariffs, which includes Rule 27.

Rule 27 and the bills of lading prescribe the duties of the railroad company, as the common carrier, and the duties of the Duquesne Company and its customers as the consignors and consignees of shipments, and these duties meet on the said side tracks. And Rule 27, applicable there in conjunction with the bills of lading draws a clear line of demarcation between the common carrier duty and service of the railroad company and the shippers' services, or private business activities, of the Duquesne Company. As to outbound shipments the railroad company's transportation duty is initiated on the side tracks at the platforms outside the warehouses and as to shipments inbound to the warehouses common carrier duty ends there. Such duty, which does not even include the loading or unloading of cars containing freight transported at carload rates, cannot properly be projected beyond the side tracks into the warehouses and the offices of the Duquesne Company, as is the purport of the Board's findings. *Merchants Warehouse Co. v. United States*, 283 U. S. 501. Such stretching of common carrier duty would nullify the uniform bills of lading and classification Rule 27. As heretofore stated the warehouse company's services are separated from and are additional to the railroad transportation services at railroad tariff rates and are paid for as such additional services by the warehouse company's customers.

The Interstate Commerce Commission has ruled that the loading and unloading of carload freight is a shipper's duty not embraced in common carrier duty and not covered by railroad freight rates, *Loading and Unloading Carload Freight*, 101 I. C. C. 394, and the Board is without statutory authority enabling it to annul that ruling. Undoubtedly the shifting of the burden and large expenses of that service from the shippers to the carriers, even if the proposal is practicable, would compel a widespread revision of railroad freight rate structures.

The separation of common carrier duty and private business at and on the side tracks is clear cut and indisputable. This evidence requires findings that the Duquesne Company is engaged exclusively in private business activities and that it did not and does not perform any railroad transportation services within the meaning of Section 1(a) of the railroad employment acts. There is additional evidence but there is no need to review it—we have gone far enough to prove our point conclusively. This whole chain of evidence is the product of the Interstate Commerce Act. The prescribed uniform bills of lading, *Bills of Lading*, 52 I. C. C. 671. The tariff rules and rates, see Section 6 of the Interstate Commerce Act. And it is the duty of the Interstate Commerce Commission to prescribe the character and quantum of the transportation services to be performed by common carriers subject to the Interstate Commerce Act as well as the freight rates that will cover such services. *United States* v. *American S. & T. Plate Co.*, 301 U. S. 402, 407; *United States* v. *Pan American P. Corp.*, 304 U. S. 156, 157-158. These cases show that transportation rates cannot be prescribed to cover services or business activities which are *per se* private business activities. In fact a separation of common carrier duty and private business necessarily must be made and enforced.

The Interstate Commerce Commission, having the duty to prescribe just, reasonable and compensatory railroad freight rates and the services covered by such rates is the only Federal agency which has statutory authority to decide after a public hearing on the question under the Interstate Commerce Act, whether, as a departure from well settled custom and practice, the common carrier transportation duties and rates of the railroad company may be altered, changed and projected into the warehouses and offices of the Duquesne Company. The Board, having no

statutory authority in the premises, has decreed this projection. The Board's findings are clearly arbitrary and invalid.

Closing the argument of our point I we submit that the Board's findings and conclusions being without substantial support in the evidence and contrary to the uncontradicted evidence and reflecting errors of law are arbitrary and invalid. *Chicago Junction Case*, 264 U. S. 258; *United States* v. *Abilene & S. Ry. Co.*, 265 U. S. 274; *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 442. And the action of the Board in reversing the meaning of a mass of uncontradicted evidence, holding that that evidence which proved common carrier and shipper business transactions established principal and agent relations, nullified the value of the submissions in these cases. Time and expense would have been conserved if the Board had, without such submissions, imposed predetermined conclusions. The requirement of fairness extends to the concluding parts of the procedure as well as the beginning and intermediate steps. *Morgan* v. *United States*, 304 U. S. 1, 20.

The foregoing has reference to the findings of the Board in No. 103. The Board's findings and conclusions in the two cases are based on the same evidence (R. 103, R. 89-90) and are so clearly alike that, without reviewing each of the 14 findings in No. 95, we can say that the errors which we attribute to No. 103 apply with like force to the Board's findings and conclusions in No. 95. These errors, it is submitted, require rejection of the Board's findings and conclusions in both cases; affirmation of the opinion of the Court of Appeals of the Second Circuit in No. 95 and reversal of the opinion of the Court of Appeals of the District of Columbia in No. 103, and affirmance of the judgment of that District Court.

POINT II.

THE JUDGMENT OF THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA SHOULD BE REVERSED AND THAT OF THE DISTRICT COURT AFFIRMED.

The opinion of the Court of Appeals of the District of Columbia has only such strength as is afforded by the invalid findings of the Board. The court accepted the findings at their face value without inquiring into the sufficiency of the evidence underlying the findings. As heretofore stated these findings which are contrary to the evidence and without support in the evidence, are arbitrary and invalid.

The major part of the facts which are referred to by the Court of Appeals, District of Columbia, center on the loading and unloading of railroad cars at the Duquesne Company's warehouses and the storage of freight by the Duquesne Company including so-called "storage in transit". The court erroneously treated these shippers' services, private business activities of the Duquesne Company, as being common carrier transportation services of the Pennsylvania Railroad Company.

The Court of Appeals, District of Columbia, quoted part of the opinion of this Court in *Baltimore & O. R. Co.* v. *United States*, 305 U. S. 507, as proof of the fact that the railroads customarily engage in the commercial storage of freight in connection with their transportation operations. Upon turning to the evidence of record in the case at bar we are unable to find that any evidence tending to prove that fact was offered or submitted. The Court of Appeals evidently misconstrued the significance of this Court's opinion in that case which was affirmation of the reports of the Interstate Commerce Commission in *New York Warehousing*, 198 I. C. C. 134, and 216 I. C. C. 291. The Commission, after an exhaustive investigation, condemned certain practices of railroad companies in the Port of New

York District. The outcome was a corrective order. (305 U. S. 507, 513, 515). Therefore a review of the Commission's reports, and the opinion of this Court sustaining the reports, will readily disclose condemnation therein of isolated unlawful storage practices and not, as the Court of Appeals erroneously found, commendation of the performance of standard or customary transportation storage services by the railroads.

The court also failed to note a very material divergence of the facts in the case at bar from the facts in the New York Warehousing cases. In the case in hand a private industry, the Duquesne Company, performs commercial storage for its own customers on its private premises under proper trade and barter arrangements not involving any common carrier tariff rates, services or duties. The Pennsylvania Railroad Company did not at any time offer or profess to perform any such services.

In the New York cases a substantial part of the storage was performed by the railroad companies on their lighterage piers because, at certain times, they seemed to have surplus or unused facilities available for such storage purposes. The railroad companies had uninterrupted possession of the freight on their own premises both for storage and transportation. In the case in hand the jurisdiction of the Railroad Retirement Board over such railroad employees employed on railroad premises has not been challenged. But the storage of merchandise in the case in hand is very different—it is storage afforded by a private industry on its private premises as a component part of its private business for which it utilized the services of its own employees. In the New York cases there were also instances in which the freight was stored by commercial warehouse companies. The decisions in the *New York Warehousing* case do not afford any support to the proposal of the Railroad Retirement Board to transform all of the

private business activities of the Duquesne Company into railroad transportation services insofar as that impossible feat can be accomplished through administrative rulings.

On the errors set forth above it is respectfully submitted that the judgment of the Court of Appeals of the District of Columbia should be reversed and that of the District Court affirmed.

POINT III.

THE RAILROAD COMPANY ITSELF PERFORMS THE TRANSPORTATION SERVICES, WHICH ARE MENTIONED IN SECTION 1(a) OF THE RAILROAD EMPLOYMENT ACTS, LEAVING NONE FOR PERFORMANCE BY THE DUQUESNE COMPANY.

All of the line haul and terminal services required to effect the placement of the loaded and empty railroad cars on the side tracks at the two warehouse plants and the removal of the cars therefrom are performed by the Pennsylvania Railroad Company itself. That accomplishes the complete performance of all transportation services embraced in common carrier duty and leaves no opportunity for the Duquesne Company to perform any transportation service on its premises. The railroad company can not do more, or less or anything different without violating Section 6(7) of the Interstate Commerce Act, Part I. *Los Angeles Switching Case*, 234 U. S. 294.

Whatever delivering, elevation, storage, handling or terminal service which is commanded by the freight traffic is performed by the railroad company and the complete force of Section 1(a) of the railroad employment acts is exerted and exhausted on that performance of every service within the scope of that section. Can that section be construed to have additional applications without limitation to a succession of storage or handling services by private industries on private premises on merchandise beyond the custody and control of the common carrier?

The Board and the Court of Appeals of the District of Columbia attributed such additional and secondary ultra transportation force to the term "storage or handling of property transported by railroad" in Section 1(a) of the Railroad Unemployment Insurance Act.

As to shipments of the Duquesne Company inbound to the warehouses the stored and handled freight had been delivered to the consignee and completely dissociated and separated from railroad transportation service by the complete performance of the bill of lading contract of carriage; by execution of the customary delivery receipt and by the operation of Rule 27 of the Consolidated Freight Classification. As to possible outbound shipments the storage and handling services were afforded merchandise on private premises to which no semblance of railroad transportation could then be attributed. If such merchandise ever was to be afforded transportation outbound from the warehouses in the future it might be tendered for transportation by private carriage or motor trucks not subject to the railroad employment acts or it might go out via the railroad company's lines. But the respect in which Section 1(a) can attach to the storage of merchandise in commercial warehouses preceding shipment has not been pointed out in the conclusions of the Board or the Court of Appeals of the District of Columbia.

Sanctioning the ultra transportation meaning the Court of Appeals of the District of Columbia said (No. 103, R. 84-85):

> "This strained construction of the language (*of Section 1a*) is rendered even more difficult by the fact that the act includes 'service in connection with * * * storage or handling of property transported by railroad.' The participle 'transported' is certainly in the past tense. Appellee (*the Duquesne Company*) answers that by interpretation we must change the word 'transported' to 'being transported'. This gets the desired result but it incidentally compels us to

limit the term 'storage' to enclosure in moving freight cars. This seems more ingenious than plausible." (Words in italics ours.)

The past tense meaning thus approved by the Court sanctions the secondary ultra transportation successive applications of each one of the eight transportation services, including elevation, delivery, storage and handling of property transported by railroad, which are specified in Section 1(a) of the railroad employment acts. However, the statutory terms are not susceptible to both a present tense and a past tense meaning—it must be only one or only the other. This past tense meaning will shrink the application of the statutory terms to the inconsequential tonnages of freight handled by the subordinate agencies, the few controlled companies, after the inbound shipments have been transported by the carriers and delivered to the controlled companies.

The whole text of the statute warrants the present tense interpretation. *Allen* v. *Ocean S.S. Co. of Savannah*, 123 F. 2d 469, 471, C. C. A. Fifth Circuit; *Walling* v. *Baltimore Steam Packet Co.*, 144 F. 2d 130, 132-135, C. C. A. Fourth Circuit.

The specification of the several enroute and terminal services in Section 1(3)(a) of the Interstate Commerce Act, Part I, was not intended to give that statute an ultra transportation application but was for the purpose of assembling all of those services within the scope of that statute. *Cleveland & St. L. Ry. Co.* v. *Dettlebach*, 239 U. S. 588; *American Paper & Pulp Asso.* v. *B. & O. R. R. Co.*, 41 I. C. C. 506, 512. The specified terms evince tautology but not enlargement of the prior transportation terms of the statute. *United States* v. *Pennsylvania R. Co.*, 242 U. S. 208, 226. The same terms incorporated later in Section 1(a) of the railroad employment acts should receive a similar interpretation.

When we trace the statutory term "transportation" back to its origin in the initial sentences in Section 1 of the Interstate Commerce Act, Part I, we find that it contemplates the actual conveyance of merchandise from one state to another by railroad. There are services which are conspicuously transportation services *per se* such as the line-hauls of merchandise performed by railroad companies. And there are services which are indisputably private business activities *per se* such as cold storage warehouse functions and the long term storage of merchandise in commercial warehouses from the harvesting season to the marketing times dissociated from the functions of the transporters and solely for the purposes of the traders. It is axiomatic that a line haul is an essential ingredient of any and every transportation service—the service could not be transportation at all in the absence of the line haul. To constitute interstate transportation service taking application of Section 1(a) of the railroad employment acts the line haul must cross some state line. The services "receipt, elevation, storage and handling of property transported by railroad" etc., specified in Section 1(a) of the railroad employment acts, are transportation services only when performed in conjunction with line hauls and only while the line haul railroad company has actual or constructive possession, and the right of possession, of the freight afforded the services. When the freight, before or after railroad transportation, is stored or handled by a warehouse company on its private premises, that is private business activity dissociated from line hauls, and every ingredient of railroad transportation and common carrier custody, and, despite any tautological or grammatical error in the statute, completely beyond the scope of Section 1(a) of the railroad employment acts which is expressly and repeatedly confined to bona fide common carrier transportation services.

POINT IV.

CONTRARY TO THE BOARD'S FINDINGS COMMERCIAL STORAGE AND SO-CALLED STORAGE-IN-TRANSIT ARE NOT TRANSPORTATION SERVICES BUT ARE PRIVATE BUSINESS ACTIVITIES.

The various services specified in Section 1(a) of the railroad employment acts, a reproduction of the same terms in Section 1(3)(a) of the Interstate Commerce Act, may be transportation services when performed by railroad companies but they are private business activities when performed, as they are every day, by private industries. Even the ordinary householder receives, stores, refrigerates and handles merchandise that has been transported by railroad or by rail express agencies. Hence the many decisions under the Interstate Commerce Act pointing out when such services are railroad transportation services and when they are private business activities. In our Point V we argue that these decisions are and should be controlling in the cases at bar.

The Board's conclusions, as quoted in our Point I, unmistakably and unequivocally show that the Board deems any owned company to be an employer within the meaning of Section 1(a) of the railroad employment acts, when that company stores or handles any merchandise or loads or unloads the merchandise to or from railroad cars provided the merchandise has been or may be transported by railroad at any time.

The Board's findings as to storage are very disturbing. Under Section 1(a) of the railroad employment acts it is the character of the services performed, and not the form or substance of ownership or control, that is determinative.

Apparently the Board so admits. (No. 95, R. 31) If the storage services performed by an owned company are private business activities *per se* then the owned company, as a matter of plain statutory construction, belongs under the Social Security Act. It is only when such storage is found to be a common carrier transportation service *per se* that the finding can exert enough force to transfer the owned company from coverage by the Social Security Act to coverage by the railroad employment acts. Section 1(a) of the railroad employment acts does not afford grounds for a conclusion that commercial storage performed by an owned or controlled company can be a railroad transportation service while identical storage performed by a commercial warehouse company nearby, not owned or controlled by any railroad company, is not railroad transportation service and is private business activity. This conspicuous inconsistency stands without a word of explanation in the Board's findings and opinion. Hence our fears as to future rulings of the Board which might evince additional expansions of the meaning of the statutory term "storage" and our preference for the present settled and well-known interpretations of the meaning of that term under the Interstate Commerce Act.

As to loading and unloading of carload freight the Interstate Commerce Commission in *Loading and Unloading Carload Freight*, 101 I. C. C. 394, 396, has stated the general rule and the very few exceptions thereto. The case in hand is not one of the few exceptions. (No. 95, R. 135) The general rule is that such loading and unloading services are shippers' services—private business activities not embraced in common carrier duty. The general rule will stand, despite any rulings of the Board to the contrary, unless and until and then only to the extent that it may be changed in formal proceedings before the Interstate Commerce Commission under the Interstate Commerce Act, part I.

In reviewing the decisions it should be borne in mind that Congress, in Section 15(5) of the Interstate Commerce Act, enacted a special statutory provision charging common carriers by railroad with the duty of loading and unloading live stock to and from railroad cars under certain conditions. This special statutory provision substantiates our statement of the general rule stated above.

ORDINARY STORAGE.

Now taking up the question, in the light of the term "storage" in Section 1(a) of the railroad employment acts and Section 1(3)(a) of the Interstate Commerce Act,—what kind of storage did Congress intend to include within the meaning of that statutory term?

As stated heretofore the Interstate Commerce Commission is charged with the important and heavy duty of prescribing just, reasonable and compensatory railroad rates and the character and quantum of the transportation services to which the prescribed rates will be applied. Upon complaint the Commission must decide whether railroad storage charges are, or are not, just and reasonable. In the exercise of its powers and the performance of its duties the Commission has repeatedly decided what kind and character of storage is a component part of common carrier railroad transportation duty and what kind and character of storage is a constituent part of private business pursuits. There are a large number of decisions on this question by the Commission and many by the Federal Courts. We shall refer to only a few. *B. & O. R. Co.* v. *United States*, 305 U. S. 507; *Turner, Dennis & Lowry Lumber Co.* v. *C. M. & St. P. Ry. Co.*, 271 U. S. 259; *Pennsylvania R. R.* v. *Kittanning Co.*, 253 U. S. 319; *American Wholesale Lumber Asso.* v. *Director General*, 66 I. C. C. 393, 397; *Eastern Shore Produce Exchange* v. *P. R. R. Co.*, 144 I. C. C. 401,

409; *Nutile Fruit Co.* v. *Boston & M. R.*, 156 I. C. C. 87, 91; *Eastern Shore, etc.* v. *Pennsylvania R. Co.*, 179 I. C. C. 642, 649.

Many years ago the Interstate Commerce Commission in *Re Demurrage Investigation*, 19 I. C. C. 496, 498, decided on November 14, 1910, said:

> "The business of a railroad is transportation, not storage."

In *American Paper & Pulp Asso.* v. *B. & O. R. Co.*, 41 I. C. C. 506, 511, 512, decided November 6, 1916, the Commission, construing what is now Section 1(3)(a) of the Interstate Commerce Act, part I, said:

> "In order to prevent overcharges and discriminations under the pretext of additional services, Congrss enacted in section 1 that the entire body of such services, many of them, according to the theory of the common law, separable from the carrier's service as carrier, should be included within the single term 'transportation' and be subject to the provisions of the act respecting reasonable rates and the like. And by section 6 no carrier may extend 'any privileges or facilities,' save as these have been duly specified. But the primary duty of a carrier is to carry. And it is not the duty of a carrier, as such, to furnish storage beyond the reasonable time necessary for unloading or removal. *Cleveland & St. Louis Ry.* v. *Dettlebach*, 239 U. S. 588; *Southern Ry.* v. *Prescott*, 240 U. S. 632; *Peale, Peacock & Kerr* v. *C. R. R. Co. of N. J.*, 18 I. C. C. 25, 35; *Lighterage and Storage Regulations at New York*, 35 I. C. C. 47, 56.

In *Dakota Monument Co.* v. *Director General*, 59 I. C. C. 101, 103, 104 the Commission said:

> "We have frequently had occasion to say that the storage of shipments beyond such time as may be required to afford shippers a reasonable opportunity to

remove them is no part of the duty of a common carrier; and we have consistently held that carriers might impose such charges as would promote the removal of freight from their premises. In a number of cases we have sanctioned charges similarly based upon an ascending scale. The clearing of carriers' terminals is the primary object of a storage charge, and a charge which goes no further than is necessary to accomplish this end is not unreasonable from the mere fact that it is higher than would be just if the value of the storage service were the only element to be considered."

In *New York Warehousing*, 216 I. C. C. 291, 348, 349, decided on June 8, 1936, the commission said:

"*Commercial nature of storage here involved.*—Numerous consuming points of the commodities previously mentioned are located within comparatively short distances from the Port of New York district. Present-day commercial necessities in the distribution of goods to a densely populated section require large amounts of warehouse space as a storage reservoir from which the goods may be drawn promptly and economically for consumption. It is a distinct commercial advantage to dealers and manufacturers to have storage facilities available at a central distributing point, rather than at scattered points, and commercial reasons account for the large tonnage of goods stored in the above district.

"Involuntary storage is a part of the transportation service defined in section 1 of the Interstate Commerce Act. Other storage, voluntary or commercial in nature, is not included within the term 'transportation' as there used. Prior report, page 139. Where it is sought to distinguish between two things which have qualities inherent in both, the use of single words or short phrases which do not draw the distinction precisely frequently leads to confusion of ideas. There are many services and acts, including storage and handling of goods, which are necessary in or incidental to the

conveyance of goods by rail from one locality to another, which are not a part of transportation as defined in section 1. A clear distinction should be made between voluntary or commercial storage ordinarily performed by a warehouse, and the involuntary storage which carriers subject to the act are obligated to perform. *State* v. *Southern Pac. Co.*, 52 La. Ann. 1822, 28 So. 372. Our duty, under the circumstances here involved, requires us to determine when transportation as defined in the act begins and ends, and to determine whether acts or services incident to the conveyance of goods from one point to another are or are not a part of transportation which common carriers subject to the Interstate Commerce Act are obligated to perform. Such matters are questions of fact.

"The business of a railroad is transportation, not storage. *Demurrage Investigation*, 19 I. C. C. 496. Storage of property transported is a transportation service only to the extent that the storage is necessarily incidental to transporting such property, and the term is used in section 1 in that limited sense. *Guaranty Claim of Central Elevator & Warehousing Co.*, 72 I. C. C. 169."

In that case the Interstate Commerce Commission decided that commercial storage in the New York District is not railroad transportation service. In the cases in hand the Railroad Retirement Board decided that commercial storage in the Pittsburgh District is railroad transportation service. These two diametrically opposite conclusions arise from interpretations and applications of statutory terms that are identical—the provisions of Section 1(3)(a) of the Interstate Commerce Act in the first instance and of Section 1(a) of the railroad employment acts in the latter one. This court sustained the Commission's report. *B. & O. R. Co.* v. *United States*, 305 U. S. 507.

From the cases cited it appears that, in respect to railroad freight traffic bona fide common carrier storage is an

incidental service, performed or afforded involuntarily by the railroads, which emanates from unavoidable incidents and circumstances attending their performance of transportation, their principal function. Storage is the antithesis of transportation. To avoid storing merchandise for shippers the railroads customarily impose exceptionally high storage, demurrage and track storage charges which are commonly referred to as penalty rates. *Turner, Dennis & Lowry Lumber Co.* v. *C. M. & St. P. Ry.*, 271 U. S. 259. If a consignee fails to unload his carload of goods promptly from the railroad car, if any consignee does not promptly accept the delivery of his carload or less-than-carload shipment, or if delays in the berthings of steamships impede the interchange of freight traffic, the railroads are thereby compelled to store the transported goods involuntarily for a temporary but usually short period of indefinite duration.

A clause in the uniform bills of lading prescribed by the Interstate Commerce Commission, *Bills of Lading*, 52 I. C. C. 671, for railroad companies is intended to relieve the railroads from long and burdensome storage of merchandise which they are unable to deliver to consignees promptly. To avoid this burden the clause enables the railroads to deliver the merchandise to a public or licensed warehouse company for storage. Such use of the clause was approved by the Commission in *Milne Lumber Co.* v. *Detroit, G. H. & M. R. Co.*, 159 I. C. C. 688, 689, in which the Commission said:

> "Section 4(a) of the bill-of-lading contract provides:
>
> 'Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination * * * has been duly sent or given, and after placement of the property for delivery at destination has been made, may * * * at

> the option of the carrier * * * be removed to and stored in a public or licensed warehouse at the place of delivery * * * at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.'
>
> "The evidence of record shows that defendant complied with the tariff rules; that complainant failed to dispose of its shipment within the free time allowed; and that defendant, in placing the shipment in storage, did nothing more than was provided in the bill of lading contract."

It appears therefore that instead of offering or professing to perform commercial storage the general rule is that the railroads expressly disclaim that obligation or duty. The divergence of the unwelcomed common carrier storage duty or burden from private business commercial storage is sharp and conspicuous. The commercial warehouse company welcomes storage business, its principal function, and those seeking storage can get all they want from that company—large quantities and long periods preferred. *New York Warehousing*, 198 I. C. C. 134; 216 I. C. C. 291. But, of course, this ultra transportation storage merits separate compensation over and above railroad transportation freight rates.

In the cases in hand there is an array of evidence which shows convincingly that the storage and handling services performed by the Duquesne Company are outside the scope of Section 1(a) of the railroad employment acts. These services are not performed by a common carrier; or in the behalf of a common carrier; or on railroad premises; or on merchandise in the possession, custody or control of a common carrier; or as a component of the common carrier transportation duty or under the terms of the uniform bill of lading of a common carrier. And the warehouse services

were ordered and paid for by the owners of the stored merchandise over, above and in addition to any railroad rates assessed by the railroad company for its separate transportation services.

The storage and handling services of the Duquesne Company are performed voluntarily by a private industry on its private premises as a constituent part of its private business activities under its warehouse receipt and private contracts with its customers for whatever storage they desire. And the terms of the uniform railroad bill of lading and Rule 27 of the Consolidated Freight Classification preclude the inclusion of any of this storage and handling service in common carrier duty. As stated common carrier duty is initiated or ended on the side tracks at and outside the warehouses—evidencing an exceptionally clear cut separation of common carrier duty from the private business activities of the warehouse company.

The Duquesne Company is a private corporation. (No. 95, R., 133) Commercial warehouse companies are distinctively private business concerns. They, like other private business concerns, cannot condemn private property for public use and they are not protected from competition by certificates of public convenience and necessity. Like retail grocers they serve a selected group of customers under the customary trade and barter arrangements and are not compelled to respond to all demands for service. Under the standard tests they are not common carriers for hire or reward. *Tap Line Cases*, 234 U. S. 1, 26. The private business activities, or trade services, of this company cannot, through administrative rulings, be converted into railroad transportation services. *Peavey & Co.* v. *Union Pac. R. Co.*, 176 Fed. 409, 419; *Great Northern R. Co.* v. *Minnesota*, 238 U. S. 340, 345, 346. The incongruous grouping of these private industries with the railroads, under the railroad employment acts, through administra-

tive rulings designed to unduly expand the special railroad employees' insurance plan, would worsen what is now an unsound grouping of a selected class of common carriers by railroad. *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330.

STORAGE IN TRANSIT.

Now turning to so-called storage-in-transit which generally means storage afforded by private industries or shippers on private premises enroute during periods in which transit or transportation by common carriers is suspended. For convenient expression the term has been distorted so that it indicates the very opposite of the actual fact—the merchandise is in fact stored while it is not in transit.

In No. 103, findings of fact Nos. 3, 5, 7, 9 and 10 of the Board, and the opinion of the Court of Appeals of the District of Columbia stress "storage in transit" which is performed by the Duquesne Company as being strong evidence of the participation by that company in the railroad transportation service of the Pennsylvania Railroad Company. The warehouse revenues emanating from this storage are featured in the Board's finding No. 9 and in the opinion of the Court in tabular form. And this item is further emphasized in the opinion of the Board as quoted in our argument of our Point I. There can be no doubt of the great evidentiary force attributed to this so-called storage-in-transit by the Board and the Court.

We attribute error to the Court and the Board on the grounds that such storage, which is customarily performed by private industries, during transit periods specified in the railroad tariffs, is not railroad transportation service but, to the contrary, is and for many years has been an activity of private industry in carrying on its private busi-

ness pursuits. It has been so treated by the courts and the Interstate Commerce Commission throughout a period of many years. Here again irreconcilable conflict between the Board's findings and the rulings of the Interstate Commerce Commission on storage is manifested.

A transit tariff of the Pennsylvania Railroad Company, Exhibit H, is in this record (No. 103, R. 172, 134). This tariff, on its face, shows that it is an offer by the railroad company of transit privileges to innumerable shippers at various cities and districts on the railroad lines. In other words the shippers may elect to accept this offer of transit privileges, or any of them may refrain from such acceptance, but those shippers who do accept thereby function as shippers on their own premises performing their own services. They do not become agents of the common carrier to perform common carrier transportation services on railroad premises or under railroad supervision.

As to any shipper who elects to utilize the tariff transit privilege the railroad companies will transport the carload shipments of that shipper, and it may be a group of shippers, from a certain point of origin to an intermediate point called a transit point and from thence to the ultimate destination determined by the shipper. The railroad companies move the shipments in sealed cars in carloads to the transit point; permit the shippers to unload the freight therefrom and take possession of the merchandise and to store or process it on their own premises or other premises which they select and later permit the shippers to reload the freight in its original or a processed form into railroad cars at the transit point and then the railroads will transport the sealed carloads of goods to the ultimate destinations. Under the transit privilege the railroads impose their through carload rates from the point of origin to the ultimate destination, which is usually lower than the combination of local carload rates to and beyond the transit

point that would be applicable in the absence of the transit privilege. *B. & O. R. Co.* v. *United States*, 305 U. S. 507, 517, 519, 525; *Cottonseed, Its Products and Related Articles*, 188 I. C. C. 605, 646, 647; *Grain and Grain Products*, 205 I. C. C. 301, 348, 349; *Transit Case*, 24 I. C. C. 340; *Fabrication-in-Transit Charges*, 29 I. C. C. 70.

In *New York Warehousing*, 216 I. C. C. 291, 349, the Commission said:

> "We pointed out in the prior report that ordinarily the transit privilege granted in connection with the transportation of goods is for the purpose of permitting milling, manufacturing, or similar processing of the goods. The underlying principle of all transit arrangements is that the same commodity which moves to the transit point shall move therefrom in a more or less changed form. *Maley & Wertz* v. *Louisville & N. R. Co.*, 36 I. C. C. 657. The holding or storing of the goods, therefore, is incidental to the main or primary purpose of performing the milling, manufacturing, or similar process.
>
> "So far as this entire record shows, none—or practically none—of the westbound goods stored under the present tariffs are held to permit a milling, manufacturing, or other similar trade process to be performed, but are held in that convenient locality awaiting a time when it will be to the commercial interest of the owner to sell or further ship the goods. This is clearly proven by the fact that the transit period has been extended from time to time by the respondents because of inability of the owner of the goods to dispose of them, by reason of economic conditions. The storage of commodities for the convenience of shippers while markets are being sought is not properly a carrier's function. *Reconsigment and Storage of Lumber and Shingles*, 27 I. C. C. 451."

Common carrier transportation duty consists of the publication of the transit privilege in the railroad tariffs, the movement of carloads of goods in sealed cars to and beyond

the transit point, and the keeping of appropriate records thereof. The common carrier activity would be more accurately described if it was referred to as "stopping" carload shipments in transit. It should also be noted that all storage and other handling or processing of the freight at the transit points, in the transit tariffs which are in evidence, is expressly left to the field of private business activities of the shipper who elects to take advantage of the transit privilege. It is a privilege voluntarily granted by carriers to shippers. It is not common carrier duty. *Central R. Co. of N. J.* v. *United States*, 257 U. S. 247.

The whole theory of transit privileges becomes clearer when we consider milling in transit. Milling in transit privileges permit the stoppage of a carload of grain at the transit and milling point enroute to be there ground into flour and the reshipment of the flour to its ultimate destination as stated above. *Transit Case*, 24 I. C. C. 340; *Larabee Flour Mills Co.* v. *Chicago, B. & Q. R. Co.*, 223 I. C. C. 55; *Northern Milling Co.* v. *Chicago & N. W. Ry. Co.*, 246 I. C. C. 499. Obviously the grinding of grain into flour is *per se* an activity of private business and is not a railroad transportation service. In granting milling in transit privileges the railroads customarily allow a period of twelve months for the exercise of the privilege. A long period of storage is thus granted in relation to milling in transit privileges. Transit privileges are also granted to steel mills for the fabrication of steel, and to saw mills for the dressing of logs and lumber.

The findings of the Board and the opinion of the Court of Appeals of the District of Columbia in respect to transit privileges are, not only contrary to the many decisions under the Interstate Commerce Act cited above but are also in sharp conflict with established business practice as disclosed in the decisions.

Section 1(a) of the railroad employment acts evinces the laudible purpose to exclude casual service and employment therefrom. Of course permanency in bona fide railroad employment was an essential and conspicuous feature of the whole special railroad employment insurance plan when it was being processed through congressional channels. Storage-in-transit is one of the most sporadic of casual services—insofar as the railroads are concerned it can be abrogated any day by merely cancelling the pertinent railroad tariff provisions; and the privilege is utilized by shippers only when its use suits their fancy.

We submit that ordinary commercial storage and so-called storage-in-transit are private business activities and are not railroad transportation services covered by the railroad employment acts.

POINT V.

THE TRANSPORTATION TERMS IN SECTION 1(a) OF THE RAILROAD EMPLOYMENT ACTS AND THE SAME TERMS IN SECTION 1(3)(a) OF THE INTERSTATE COMMERCE ACT SHOULD BE CONSTRUED TO HAVE THE SAME MEANING.

Supplementing our argument in our Points III and IV we desire to show additional grounds for our contention that interpretations of Section 1(3)(a) of the Interstate Commerce Act, part I, and Section 1(a) of the railroad employment acts should be harmonious.

Section 1(3)(a) of the Interstate Commerce Act, part I, reads in part as follows:

> "The term transportation as used in this part shall include locomotives, cars and other vehicles, vessels, and all instrumentalities of shipment or carriage, irrespective of ownership or of any contract express or

implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported."

That is the first assemblage of the eight terms in statutory form which we have discovered. The eight terms are (1) receipt, (2) delivery, (3) elevation, and (4) transfer in transit, (5) ventilation, (6) refrigeration or icing, (7) storage and (8) handling of property transported. These terms have been in the Interstate Commerce Act, and the preceding statute known as the Act to Regulate Commerce for more than 35 years. They have recently been incorporated in the Railway Labor Act, the Carriers' Taxing Act, and the two railroad employment acts. Difference in parts of the texts of these statutes as mentioned in the Board's opinion in the case under No. 95 (R. 31-44) may be material in the consideration of questions not involved herein, but such differences are not material here on the question in hand—does that assemblage of eight terms apply only to transportation services performed within the confines of common carrier duty or does it have ultra transportation application to private industries, private premises and private business activities?

With inconsequential exceptions the assemblage of terms in the railroad employment acts is an exact reproduction of the assemblage of the eight terms in the present Interstate Commerce Act, part I, and its predecessors, including even the punctuation and grammatical errors. One exception is that the term "ventilation" in the Commerce Act was omitted from the railroad employment acts. The other exception is that the term "storage and handling of property transported", in the Commerce Act, has the addition of the two words "by railroad" in the railroad employment acts which manifest that much additional confinement of

the railroad employment acts to railroad transportation service. We may properly assume that Congress intended that the terms in the railroad employment acts would receive the same interpretations that have been accorded to these terms in court and Commission decisions under the Interstate Commerce Act. There can be no doubt that when Congress incorporated the term "storage" in the railroad employment acts it meant only transportation storage, not commercial storage, as then well settled in court and Commission decisions. *United States* v. *Merriam*, 263 U. S. 179, 187.

The line of demarcation between common carrier duty and shippers' services, which are activities of private business, has been drawn, and has remained settled for many years, in accordance with the provisions of the Interstate Commerce Act. Railroad transportation services, classifications, tariffs and rates and shippers' facilities and duties have been adjusted thereto. As to these matters, to avoid confusion, administrative rulings and findings under both statutes should, we submit, be similar and should conform with what has been settled law for many years under the Interstate Commerce Act.

The findings of the Board under the railroad employment acts in this case are to the effect that, merely because the railroad company owns the capital stock of the Duquesne Company, a private industry, all of the business activities of the private industry are common carrier railroad transportation services. But in fact they are not such services. Of the three statutes a much broader test as to the character of service performed is afforded by the Interstate Commerce Act. Under the tests of that Act, in a case in which a tap line lumber railroad owns the capital stock of a grocery store or a blacksmith shop, even if doubt arose in the Section 1(3) phase of the test, it will become perfectly obvious that transportation rates, conforming with Section 6, of the Commerce Act, cannot be formulated or

published in tariff form for selling groceries or shoeing horses, nor can the grocery store or blacksmith shop yield railroad transportation revenues such as are contemplated in Section 20 of the Interstate Commerce Act. The thought that any industry can be a common carrier under the railroad employment acts and not a common carrier under the same statutory language in the Interstate Commerce Act is untenable.

In *U. S.* v. *American S. & T. Plate Co.*, 301 U. S. 402, 408, this Court held that the Interstate Commerce Commission—

> "is clearly empowered to determine what is embraced within the service of transportation and what lies outside that service."

That opinion, page 404, points out the importance of the Commission's duties in exercising that power—determination of the character and quantum of services to which prescribed railroad rates apply and suppression of dissipation of revenues emanating from such rates through the granting of allowances to shippers, under Section 15(13) of the Interstate Commerce Act, for the performance of shippers services—such as the private business activities which we have discussed at length herein.

The Commission's decisions, which are well supported by court decisions, should prevail.

Some very important practical questions arise from the Board's proposal to convert this private industry into a railroad transportation agency. Let us assume that some railroad company owned the entire capital stock of a sugar refinery, retail hardware store or a cold storage warehouse company. Can the functions of a modern cold storage warehouse be properly transformd into common carrier transportation duty by any administrative ruling? Is it practicable or feasible for the railroads to assume and perform such functions? In any event, is it the Board or the

Interstate Commerce Commission that should initiate the innovation? This record is devoid of evidence that will even tend to answer any of these except the last question. And when the Board assumes to arbitrarily decide that all kinds of storage is railroad transportation service, contrary to the well grounded opinions of the courts and the Interstate Commerce Commission, it cannot escape error of grave import. Whenever the Board is confronted with a doubtful question as to the character of storage it should submit the matter to the Interstate Commerce Commission for decision. The Commission in Sections 12 and 13 of the Interstate Commerce Act has the required statutory authority.

IN CONCLUSION

We submit that this Court should—

In No. 95. (a) Find that the Board's findings, conclusions and opinion are arbitrary and invalid.

(b) Affirm the opinion of the Circuit Court of Appeals, Second Circuit.

In No. 103. (a) Find that the Board's findings, conclusions and opinion are arbitrary and invalid.

(b) Reverse the opinion of the Court of Appeals of the District of Columbia.

(c) Affirm the judgment of the District Court for the District of Columbia.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

Nos. 95 and 103.—October Term, 1945.

Railroad Retirement Board, Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees, and George M. Harrison, Petitioners,	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
95 *vs.*	
Duquesne Warehouse Company.	
Duquesne Warehouse Company, Petitioner,	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.
103 *vs.*	
Railroad Retirement Board and Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.	

[January 2, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

The Railroad Retirement Act of 1937, 50 Stat. 307, 45 U. S. C. § 228a, established a system of annuity, pension, and death benefits for employees of designated classes of employers. The Railroad Retirement Board adjudicates claims of eligible employees for the various types of benefits created by the Act. § 10(b). The eligibility of an employee for such benefits is based on service to those included in the Act's definition of "employer". § 1(a). The question arose whether the Duquesne Warehouse Co. was such an "employer". The Board after a hearing found in No. 95 that it was. Duquesne, pursuant to the provisions of § 11 of the Act, brought suit in a district court to compel the Board to set aside its order.[1] That court rendered judgment for Duquesne. 56 F. Supp. 87. The Circuit Court of Appeals affirmed, by a divided vote. 148 F. 2d 473.

[1] The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and its president, G. M. Harrison, were allowed to intervene as defendants in No. 95. The Brotherhood intervened in No. 103.

The Railroad Unemployment Insurance Act of 1938, 52 Stat. 1094, 45 U. S. C. § 351, established a system of unemployment insurance for employees of designated classes of employers. The Railroad Retirement Board adjudicates claims of eligible employees for unemployment insurance payments. § 5(b). The eligibility of an employee for such payments is based on service to those included in the Act's definition of "employer". § 1(a). The question arose whether Duquesne was such an "employer". The Board after a hearing found in No. 103 that it was. The findings were identical to those which the Board made in No. 95 and were based on the same record. Duquesne, pursuant to § 5(f) brought suit in the district court for the District of Columbia to set aside that order. That court gave judgment for Duquesne. The Court of Appeals for the District of Columbia reversed. 149 F. 2d 507. Since the definition of "employer" under both Acts was the same, there was presented a conflict in decisions which led us to grant the petitions for writs of certiorari.

The material part of the definition of "employer" contained in each Act is as follows:

> "The term 'employer' means any carrier . . . and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service . . . in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad . . . ."

Duquesne meets the requirements of the first part of the definition. For it is a corporation, all of whose stock is owned by the Pennsylvania Railroad Company, a carrier by railroad. The question is whether Duquesne "performs any service" (1) "in connection with the transportation of . . . property by railroad" or (2) "in connection with . . . the receipt, delivery . . . storage, or handling of property transported by railroad."

Duquesne operates two warehouses owned and leased to it by the Pennsylvania, one in Pittsburgh and the other in East Liberty, within the Pittsburgh city limits. Each warehouse is on a rail siding of the Pennsylvania. At East Liberty, Duquesne handles and stores carload sugar, all of which comes in and goes out over the Pennsylvania. The sugar is handled by Duquesne under so-called storage-in-transit privileges covered by tariffs filed

by the Pennsylvania with the Interstate Commerce Commission.[2] Duquesne unloads the sugar from the Pennsylvania's cars on arrival and reloads the sugar into Pennsylvania's cars on their departure. By the tariff the owners are required to do the loading and unloading. The work of unloading and loading is performed for the owner by Duquesne, who bills the owner for that service as well as for storage and other services rendered. At its Pittsburgh warehouse Duquesne handles freight which has come in, or is destined to movement, over the Pennsylvania, or which has both come in and is going out over the Pennsylvania. The commodities handled at that place are hauled in both carload and less-than-carload lots. Duquesne loads and unloads the carload shipments as they arrive at and depart from its platform, stores the goods, and performs other handling services in connection with their receipt and delivery. Duquesne charges the owner for these services. In the case of incoming less-than-carload shipments the freight is unloaded by the Pennsylvania from the cars to its platform and is delivered to and received by Duquesne there. In the case of outgoing less-than-carload shipments, Duquesne delivers the freight on the Pennsylvania's platform. Pennsylvania then issues its bill of lading, loads the freight into cars, and moves them out. During a part of the period relevant here,[3] Duquesne also performed unloading, storing and reloading services and certain other transit services at Erie, Pennsylvania, in connection with carload shipments of newsprint paper which were entitled to storage-in-transit privileges under the tariffs. These services were similar to those performed by Duquesne at East Liberty.[4]

[2] Incoming shipments are consigned to the owner care of Duquesne, the route being designated "Penn R R — For Stge in Transit". Outgoing shipments are consigned to the owner; they have a transit record number and are marked "accorded transit privilege at East Liberty, Pa." That is, sugar in carload lots transported by the Pennsylvania to consignees at East Liberty may be delivered there to the consignees at the local rates. When it is subsequently shipped out via the same road it is entitled to be charged the through rate from the first point of shipment to the ultimate destination.

[3] Between August 1937 and May 1938. The Board found that Duquesne is now, and has been at least since August 28, 1935, an employer within the meaning of the Acts.

[4] Duquesne also has "salvage freight" agreements with the Pennsylvania under which the Pennsylvania turns over to it ~~for resale and disposal~~ over and damaged freight which has been refused or unclaimed by the owner. For this service Duquesne retains 10 per cent of the gross plus certain costs and remits the balance to the Pennsylvania.

, for sale or other disposition, "over

Of the total space used by Duquesne at its warehouses at East Liberty and Pittsburgh about 30 per cent was devoted to the handling of freight accorded storage-in-transit privileges in 1936; about 12.5 per cent in 1937; about 12.5 per cent in 1938. During the period of operation at Erie, all the space at that point was used for such freight.

It appears that the definition of "employer" in the present Acts derives without substantial change from the Railway Labor Act, 48 Stat. 1185, 45 U. S. C. § 151, First.[5] We are referred to the legislative history of the Railway Labor Act which was sponsored by Mr. Eastman, Federal Co-ordinator of Transportation. Reliance is made on his testimony at the hearings[6] as indicating that the words in the carrier definition in the Railway Labor Act descriptive of transportation service were taken from the Interstate Commerce Act[7], 41 Stat. 474, 54 Stat. 899, 49 U. S. C. § 1. The Railroad Retirement Act of 1937 was sponsored by both labor and management, whose views were presented at the hearings by George M. Harrison.[8] References are made to his testimony that the carrier affiliates embraced within the definition of "employer" are those who are engaged in service that is part of railway transportation.[9] Duquesne argues on the basis of that legislative history that any service "in connection with the transportation" of prop-

[5] The corresponding part of the definition of "carrier" contained in § 1 First of the Railway Labor Act reads as follows: "any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad . . ."

[6] Hearings, S. Committee on Interstate Commerce on S. 3266, 73d Cong., 2nd Sess., pp. 10-11, 145. At the latter point he testified, "I am inclined to believe that for the present it would be well not to go beyond carriers and their subsidiaries engaged in transportation." And see Hearings, H. Committee on Interstate and Foreign Commerce on H. 9650, 73rd Cong., 2d Session., pp. 17, 18.

[7] Sec. 1(3)(a) of the Interstate Commerce Act includes in the definition of transportation "all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

[8] See Hearings, H. Committee on Interstate and Foreign Commerce, on H. R. 6958, 75th Cong., 1st Sess., pp. 10-11, 82.

[9] See Hearings, *supra*, note 8, pp. 16, 17. He testified at the latter point that carrier affiliates were included "when those companies are engaged in the business of transporting passengers or property for the railroad, or other service that is a part of railway transportation." And see Hearings, S. Committee on Interstate Commerce on S. 2395, 75th Cong., 1st Sess., p. 11.

erty or any service "in connection with" the receipt, etc., of "property transported by railroad", as used in the present Acts, means that kind of activity which is defined by the Interstate Commerce Act as forming a part of transportation service. On the other hand, the Board argues that the statutory definition of "employer" is not so restricted. It stresses the broad sweep of the statutory language and the purpose to bring under the Act affiliates which carry out portions of the railroad's business.[10]

We do not find it necessary to resolve that controversy. At the very least the phrases in question embrace activities which form a part of transportation service within the meaning of the Interstate Commerce Act. Duquesne regularly performs service of that character. It is, therefore, an "employer" within the meaning of the present Acts.

We have noted the loading and unloading services rendered by Duquesne. The duty of unloading carload freight ordinarily rests with the shipper or consignee. *Pennsylvania R. Co.* v. *Kittanning Co.*, 253 U. S. 319, 323. But it is a transportation service within the meaning of the Interstate Commerce Act. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 295 U. S. 193, 200; *Barringer & Co.* v. *United States*, 319 U. S. 1, 6. Its cost may be included in the line-haul tariffs or separately fixed or allowed as an addi-

[10] Senator Wagner, who was in charge of the Retirement Bill in the Senate stated: "the coverage is extended expressly to railroad labor organizations, railroad associations, traffic associations, and is made more clearly applicable to subsidiaries of railroad companies such as refrigerator storage and other facilities. In other words, it covers a greater number of employees, not only those directly in the railroad business but those associated with it, and in that regard it is more liberal than the present act." 81 Cong. Rec. 6223.

In S. Rep. No. 697, 75th Cong., 1st Sess., p. 7, it is stated, after noting that casual service and operation is excluded, "In addition to trucking service, it is intended to exclude employees of a contractor who may, for example, be occasionally employed by a 'carrier' to repair a depot or build a bridge. Contractors, other than those which perform casual service, would not be excluded, irrespective of whether control be legal or de facto. De facto control may be exercised not only by direct ownership of stock, but by means of agreements, licenses, and other devices which insure that the operation of the company is conducted in the interests of the carrier.

"By these changes there are brought within the scope of the act substantially all those organizations which are intimately related to the transportation of passengers or property by railroad in the United States."

It is also pointed out that various railroad associations are included in the Acts and that their express inclusion was to make clear what had been previously implied. *Id.*, pp. 6-7. It is therefore argued that since some of those associations are not engaged in railroad transportation, Congess did not intend the coverage of the Acts to be restricted to organizations engaged in transportation either in the ordinary sense or in the sense in which the Interstate Commerce Act uses the term.

tional charge. *Adams* v. *Mills*, 286 U. S. 397, 410-415; *Loading and Unloading Carload Freight*, 101 I. C. C. 394; *Berg Industrial Alcohol Co.* v. *Reading Co.*, 142 I. C. C. 161, 163-164; *Livestock Loaded and Unloaded at Chicago*, 213 I. C. C. 330, 336-337. See *Haberman* v. *Pennsylvania R. Co.*, 234 I. C. C. 167, dealing with less-than-carload lots.

Duquesne's answer is that the service of loading and unloading is done by it for its customers, that these services are rendered before railroad transportation has begun or after it has ended, that they are not and cannot be a part of railroad transportation since the tariff of the Pennsylvania forbids it from performing the services. Duquesne's conclusion is that under such circumstances loading and unloading are not and cannot be a part of railroad transportation. The question, however, is not whether in these cases the service of loading and unloading is being rendered by the Pennsylvania and is, therefore, in fact a part of its transportation service. It is not whether the affiliate would itself be subject to the Interstate Commerce Act. It is whether a carrier's affiliate is performing a service that could be performed by the carrier and charged for under the line-haul tariffs. If it is such a service, it is a transportation service within the meaning of the present Acts. Senator Wagner, who was in charge of the Retirement Bill in the Senate, stated that its coverage included "not only those directly in the railroad business but those associated with it."[11] And George M. Harrison, on whose testimony Duquesne heavily relies, stated that affiliates of carriers were included "when those companies are engaged in the business of transporting passengers or property for the railroad, or other service that is a part of railway transportation."[12] In other words if a service is involved which the railroad could perform as a part of its transportation service, it is within the present Acts. It then makes no difference that it is performed by a carrier affiliate rather than by the carrier itself. We think it plain that the definitions in question include at the very least those activities which would be transportation services when performed by a railroad but which it chooses to have performed by its affiliate.

We do not decide whether services other than loading and unloading which are performed by Duquesne are in the same cate-

[11] See note 10, *supra*.

[12] See note 9, *supra*.

gory nor whether the "employer" definitions may be given a broader scope. It is sufficient for the disposition of these cases that the loading and unloading services performed by Duquesne are services performed "in connection with the transportation of . . . property by railroad."

The judgment in No. 95 is reversed. The judgment in No. 193 is affirmed.

It is so ordered.

Mr. Justice JACKSON took no part in the consideration or decision of these cases.